THE Calcutta Weekly Notes

REPORTS OF IMPORTANT DECISIONS

OF THE

CALCUTTA HIGH COURT

AND OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON

Appeal from India.

VOL. XIX.

NOVEMBER TO SEPTEMBER

1914

CALCUTTA:
WEEKLY NOTES OFFICE,
3, HASTINGS STREET.

TABLE OF CIVIL CASES.

(Vol. XIX.)

CASES REFERRED TO.

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TRANSFER OF PROPERTY ACT—contd.

———, s. 106.

See s. 108 (e) 1019

——— ss. 106, 107, 116—**Lease without registered instrument for purposes other than agriculture or manufacture at a fixed rent a year without any settlement as to duration of tenancy—Effect of holding over with acceptance of rent by landlord—Notice necessary to terminate tenancy, nature of—Notice signed by am-muktear if valid—Fifteen days from date of notice, calculation of.**| The Defendant took the premises in suit for a stationery shop as a tenant from the commencement of the Bengali year, the rent being fixed at a certain amount a year, but the period during which the tenancy was to continue was not settled. The tenant continued in occupation after the end of the year and the landlords accepted rent for the next year. The Plaintiff landlords subsequently served a notice to quit by registered post. The notice was signed by an **am-muktear** and was dated the 16th Baisakh and called upon the Defendant to vacate the premises within the 31st Baisakh. The registered cover which was addressed to the Defendant at his place of business was returned to the sender by the Postal authorities with an endorsement that the addressee had refused to accept it. There was no oral evidence to show where the cover was posted or when and where it was tendered to the Defendant. On the cover were the seals of the office of posting and the office of destination as also an endorsement that the letter was returned as the addressee refused to receive it, the seals and the endorsement bearing date corresponding to the date of the notice. **Held**—That under sec. 107 of the Transfer of Property Act which was in force at the time a lease of immoveable property from year to year or for any time exceeding one year or reserving a yearly rent could be made only by a registered instrument and consequently the Defendant became a tenant for one year only and in the absence of an agreement to the contrary within the meaning of sec. 116 of the Act, the effect of his holding over was that, after the expiry of the year in which the tenancy took effect, it was renewed from month to month and was terminable by the lessors by fifteen days' notice expiring with the end of a month of the tenancy. That the notice was a fifteen days' notice and was properly signed. It was not intended to lay down in **Subadani v. Durga Charan**, I. L. R. 28 Cal 118 s. c. 4 C. W. N. 790 (1900), that in calculating the 15 days the day on which the notice was served as also the date on which the notice expired were both to be excluded. GOBINDA CHANDRA SHAHA v. DWARKA NATH PATITA 489

———, s. 107.

—**Fishing lease for 9 years, void for want of registration—Removal of fish under authority of lease, if wrongful.**

See Fishing Lease 872

———, s. 108

—**Working of new mines by lessee—Mining lease from the holder of maintenance grant for life—Absence of express authorisation to work new mines in deed of grant—Contract of parties, reliance on, for ascertaining intention of grantor—Open mine, what is.**| Three of the principal Defendants held a mining lease of the disputed properties from Defendant No. 1 to whom the property had been given for her maintenance for life by the former proprietor. The deed did not contain any express provision authorising the grantee to open new mines and to appropriate the minerals therefrom. The Plaintiff who was a proprietor by right of purchase sued for a declaration that these four Defendants had no right to open new mines and to raise minerals therefrom on the disputed property, also for a perpetual injunction to restrain them from opening and working new mines and from further working the new mines which they had opened. **Held**—That sec. 108 of the Transfer of Property Act which defines the rights and liabilities of lessor and lessee provides in cl. (o) that in the absence of a contract or local usage to the contrary the lessee must not work mines or quarries not open when the lease was granted and no question of local usage arising in the present case and there being no express provision authorising the grantee to open new mines and to appropriate the minerals therefrom in the deed which was one for maintenance for the life of the grantee, the grantee had no right to grant a mining lease for the purpose of opening and working new mines. Circumstances under which a mine may be said to be open considered. F. F. CHRISTIAN v. TEKAITNI NARBADA KOERI 796

———, ss. 108 (e), 106—**Lease of colliery—Destruction by fire—Notice by lessee to determine lease if should be 15 days' notice.**| A notice by the lessee under sec. 108 (e) of the Transfer of Property Act avoiding the lease on the ground of destruction of the lease-hold property by irresistible force takes effect immediately on service. Sec. 106 of the Act has no application to such a notice. DAMODA COAL COMPANY LIMITED v. HURMOOK MARWARI ... 1019

———, s. 108

—Respective rights and liabilities of lessor and lessee of coal mine. See Mine 887

———, s. 108

—**Fixture, right of tenant to remove—Acquisition of land with building by Government—Tenant if only entitled to price of material.**| Held (as to the contention that under sec. 108 of the Transfer of Property Act, the right of the tenant to remove fixtures must be exercised during the continuance of the lease)—That the provisions of sec. 108

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ARMS ACT (XI of 1878), ss. 14, 19 (a) and 20—" Fire-arms," meaning of, if includes parts—Elements necessary to constitute offences under secs. 19 (a) and 20—Criminal Procedure Code (Act V of 1898), sec. 239—Possession of arms and possession intending to conceal it from public servant and conspiracy to manufacture arms, joint trial of—Indian Penal Code (Act XLV of 1860), sec. 120B—Conspiracy, limit of punishment when offence not committed—Conspiracy and abetment.] The accused were charged (1) under sec. 14 of the Arms Act for having in their possession or under their control fire-arms, (2) under sec. 20 for having in their possession or control such arms in such a manner as to indicate the intention that such act might not be known to any public servant, (3) under sec. 120B, I. P. C., read

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ARMS ACT—**contd.**

with sec. 19, cl. (a), of the Arms Act for having conspired to manufacture or keep fire-arms in contravention of s. 5 of the Arms Act. The finding on the 3rd charge was that there was only a conspiracy to manufacture without an actual manufacture, and the Sessions Judge sentenced the accused on this charge to three years' rigorous imprisonment. **Held**—That there was no misjoinder of charges. The offences charged were committed in the same transaction and sec. 239, Cr. P. C., authorises such charges to be tried together. That the term " fire-arms " as used in sec. 14 of the Arms Act means arms that are fired by means of gunpowder or other explosive and includes parts of fire-arms That the only additional element necessary to constitute an offence under sec. 20 is that the possession should be in such a manner as to indicate an intention that such act may not be known to any public servant. That the offence under sec. 19, cl. (a), of the Arms Act is keeping arms for sale and not keeping only. Fletcher, J.—In cases of conspiracy the agreement between the conspirators cannot generally be directly proved, but only inferred from other facts proved in the case. The facts proved against the accused, namely, the hiring of the house, the finding of a considerable number of parts of fire-arms in the house, the finding of tools there, also that work had been done to some of the parts of fire-arms found, left no doubt that a conspiracy existed between them to manufacture fire-arms. That on the finding the sentence on the third charge should be under sec 120B, I. P. C., read with sec. 19, cl. (a), of the Arms Act and sec. 116, I P. C., and not under sec 109, I. P. C. **Held per** Beachcroft, J.—That the term " transaction " is not synonymous with the term " offence," and so long as the conspiracy continued, the transaction which began with the forming of the common intention continued and the offences of possession of fire-arms and conspiracy to manufacture arms were committed in the same transaction. That on a conviction under sec. 120B, I. P. C., if an offence has been committed, the punishment is provided by sec. 109, I. P. C., and if an offence has not been committed, the punishment is limited to the extent provided by sec. 116. **Semble.**—Strictly speaking, in cases where an offence has been committed in pursuance of a conspiracy, there should not be any conviction for conspiracy, but for abetment of the offence; for conspiracy followed by an act done to carry out the purpose of conspiracy

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EDITORIALS.

THE

Calcutta Weekly Notes

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NOTES

NOTICE.

Notice is hereby given that Appeals from the Original Side will be heard by the Appeal Court on and from the 23rd day of November 1914.

By order,
MAURICE REMFRY,
Offg. Registrar.

HIGH COURT, O. S.,
The 4th November 1914.

Declaration of War with Turkey.

The conduct of the Ottoman Government in connection with the German cruisers *Goeben* and *Breslau* has resulted in the declaration of war between Great Britain, France and Russia on the one hand and Turkey on the other. We had in these columns tried to justify the alleged purchase of these German war-vessels by Turkey. But at the same time we pointed out that if Turkey had at all acted in good faith she must hoist her own flag and put on board a Turkish crew. We notice that this is precisely what the allied European Powers demanded of Turkey. Far from complying with this request, Turkey allowed these vessels with a German crew on board to bombard Odessa. This act alone constituted not only a simple breach of neutrality on the part of Turkey but an act of war. Turkey should have interned the German crew within 24 hours of the entry of these vessels into Turkish waters. The allied Powers have showed her no end of forbearance in giving Turkey every chance of showing her *bonâ fides* in the matter. We anticipated that the allied Powers would adopt measures short of war such as peaceful blockade for giving Turkey a chance of resiling from the untenable position she had taken up with regard to these German cruisers and we have no doubt that the Powers had resorted to such measures. But at last it seems that German intrigue has forced the hands of the Turkish Executive to launch into a war with the allied Powers with which Turkey has little concern. We consider the step taken by Turkey at this juncture, after she has suffered so much from the Balkan war, as a height of indiscretion deserving of little sympathy. All the same we are deeply sorry that an Oriental nation with its historic past and with its promise of future regeneration, Turkey should at this great struggle for liberty against autocracy launch herself into the suicidal policy with which no sensible people in the world can have any sympathy.

The late Sir Henry Prinsep.

It is with great sorrow that we have to record the death of Sir Henry Thoby Prinsep, who before his retirement in 1904, was a judge of the Calcutta High Court for over 26 years. We published in these columns on his retirement from the Bench a review of his career in India. He was the last of the Haileybury civilians who sat on the Bench of the High Court. He was an all round sound judge and in his dealings with the members of the profession a thorough and perfect gentleman. As a judge presiding over the Criminal Revisional and Appellate Bench, there have been very few his equals. With his quick and ready grasp of the criminal law he was always ready to grant relief to the aggrieved and put right the erring judicial officers and Magistrates in the Mofussil. Having served in various capacities in the public service of this Presidency and having known its people intimately, he knew how to deal with them in a manner which inspired confidence. When in the

wrong himself he would readily admit it and disarm criticism. As a matter of fact we have had our own differences with him. Both when he was on the Bench and after he had retired, we have had occasions to take exception to his opinions. But these differences were invariably settled in a manner that enhanced one's regard for him. Quite recently we published in these columns a letter from him putting us right with regard to a matter in which we had done him an injustice being ignorant of certain facts. Candour and straightforwardness were qualities which endeared him even to those who differed from him in opinions and ideas. His death will be mourned by a large circle of friends and acquaintances in this Presidency.

Sir William Markby.

During the Vacation passed away another ex-Judge of the Calcutta High Court whose memory is cherished with the deepest veneration by those who have seen him on the Bench As well on account of his intellectual attainments, as for the innate nobility of his character, he commanded the respect of his colleagues and of the Bar to an extraordinary degree. He was deeply versed in English law and he always brought to bear its sound principles of equity and justice in the interpretation of the statute and personal laws in India. Some of the soundest judgments of his time reported in the Law Reports are his. Sir William's interests were not confined within the limits of his official duties. He was for years Vice-Chancellor of the Calcutta University. He will also be remembered as a co-signatory with Lord Hobhouse and Sir Richard Garth of the well-known protest against the combination of Judicial and Executive functions in the administration of India. His contribution to the science of jurisprudence is also well-known to every student of law in India.

The late Mr. Peter O'Kinealy.

The death of Mr. Peter O'Kinealy which happened during the Long Vacation, has also been received by the members of the Calcutta Bar and his friends in India with great regret. He was a puisne judge of the Calcutta High Court for a short time and was the Advocate-General to the Government of Bengal for some time. Quiet and unassuming in his disposition he was at the same time a very well read and sound lawyer. Few people know the services he rendered both to the Government and the people of this province when Bengal was thrown into a paroxysm of agitation in consequence of the Partition of Bengal. When people's minds are agitated with any genuine grievances, it is but natural for them to be indiscreet in their speeches and writings. We have reasons to believe that Mr. Peter O'Kinealy used to make allowances for human nature and vetoed state prosecutions for indiscreet utterences in the Press or on the Platform. Within his somewhat frigid exterior he had a warm heart and to those who knew him intimately he was a genuine friend. He always used to observe the utmost rectitude in the discharge of his professional duties and his example is worthy of emulation by the Bar.

Hindu Widow's Right to Maintenance against Father-in-law.

In *Meenakshi Ammal* v. *P. Rama Aiyar*, Benson and Sundara Ayyar, JJ., of the Madras High Court dismissed a suit for arrears of maintenance brought by a Hindu widow against her father-in-law and his sons, on the ground that a Hindu is under no obligation to maintain his widowed daughter-in-law, when he has no ancestral assets in his hands, which was found to be the case here. (I. L. R. 37 Mad. 396). The question was decided so far as the Calcutta High Court is concerned, in 1865, by a Full Bench in *Khetra Mani Dasi* v. *Kashinath Das*, 2 B. L. R. (A. C. J.), p. 15, where the views of the majority of the Judges are cautiously summed up in the head-note as follows :—

"A Hindu died possessed of no property but leaving a widow. On his death she left the house of her father-in-law, and went to reside at her father's house. Her father-in-law was not possessed of any ancestral property. *Held*, that she could not sue her father-in-law for a sum of money on account of maintenance."

In a case under the Dayabhaga, even when the father is in possession of ancestral property, the son has no right whatever in it. Consequently a predeceased son of a Dayabhaga Hindu leaves no property charged in the hands of persons who have a preferential claim to the inheritance with his widow's maintenance. And as this is the reason of the rule which admits claims to maintenance by persons other than certain specified near relations, a Dayabhaga Hindu father would appear to be exempt from all legal obligation to maintain

a son's widow, even though he may hold ancestral property. Under the Mitakshara, however, the son acquires a vested interest in ancestral property at birth and the right of the widow of a predeceased son to claim maintenance against the father (and equally so against any other coparcener) would therefore turn upon the existence of ancestral property.

Thus widows of predeceased sons stand in a less favourable position in Bengal than elsewhere in India. The moral obligation of the father who has the means to maintain her is however unquestionable, and early in the history of the Courts of law in this Province (in *Rajumani Dasi* v. *Sib Chandra Mullik*, 2 Hyde 103) the Judges laid down the salutary, though seemingly anomalous, rule that this moral obligation of the father-in-law becomes a legal obligation in the hands of the heirs who inherit his properties. This rule was approved in the Full Bench case cited above by Sir Barnes Peacock, C. J.

The Madras case therefore does not lay down any new principle of Hindu Law. But there occur in the judgment some very suggestive *obiter dicta* which deserve attention. Having laid down as above that there is no rule of Hindu Law to support a claim of maintenance by a widowed daughter-in-law where there is no ancestral property, the learned Judges say :—

"We may at once observe that even if there were such a rule according to the Hindu Law, we would not be bound to give effect to it. The rules of Hindu Law are binding on the Court only where it is necessary to decide 'any question regarding succession, inheritance, marriage or caste or any religious usage or institution.' In so far as a right to maintenance is a charge on the inheritance of any person according to the Hindu Law, the rules laid down by it would be enforceable. But where maintenance is claimed against a person, not on the ground that the property coming by inheritance to him is burdened with the maintenance of the person claiming it, but on the ground that the Hindu lawyers have placed such a duty on the Defendant, the Hindu Law as such has no obligatory force. The Court would have to decide the question in accordance with equity, justice and good conscience. The rules and precepts of Hindu Lawgivers might often be entitled to great respect in deciding the rule of justice in such cases. But the weight due to them would depend on the circumstances of each case, including the conditions of modern society and the conceptions of equity and justice which the Court considers it right to give effect to."

"An adult son," the learned Judges continue, "has no right to maintenance against his father. How can his wife's right be regarded as standing on a higher footing? The son's marriage may have been performed after he attained his majority. It may have been performed by him of his own will and perhaps without the father's advice and consent." "There might be special circumstances," their Lordships add, "which may make it equitable and just in a particular case to uphold such a claim" but their attention had not been drawn to any such circumstances in the present case.

HISTORY OF THE PRIZE JURISDICTION OF THE HIGH COURT AT CALCUTTA.

The Prize Jurisdiction of the Calcutta High Court has an interesting history behind it. The Charter of the Supreme Court gave Admiralty Jurisdiction to the Supreme Court over Bengal, Bihar and Orissa and all territorial waters therein. In the year 1782 an application was made on behalf of George Johnstone, commodore of a squadron of His Majesty's ships in the East Indies, to adjudge the ship *Hinchinbrook* which was captured at Madras for being brought to and condemned as prize in the Supreme Court of Calcutta. Sir Elijah Impey, C. J., held that the Court had no jurisdiction to entertain prize causes. He was of opinion that the Ordinary Admiralty Jurisdiction of the Court did not confer Prize Jurisdiction on the Court unless it was specially conferred. The learned Chief Justice undoubtedly took the right view of the matter. In 1793 the French vessel *La Bien Aimée* was captured on the river Hooghly and at the port of Calcutta by the forces of the East India Company in an engagement when war existed between England and France. An application was made before Chambers, C. J., Hyde, Jones and Dunkin, JJ., to have the vessel condemned as a legal prize. It seems to have been admitted in that case that cls. 26 and 28 of the Supreme Court Charter contemplated only civil admiralty jurisdiction between individuals in marine cases and did not refer to Prize Jurisdiction. But reliance was placed upon Lord Mansfield's dictum in *Le Caux* v. *Eden* (2 Doug 615), that since the reign of Queen Elizabeth this jurisdiction had been exercised by

the Judge of the Admiralty not under any special commission but by virtue of the "inherent power" of the Court as "King's Commission or both." The statute of 9 Geo. II, Ch. 34, was cited to show that the jurisdiction over prize causes existed in every one of the King's Courts of Admiralty in Great Britain or elsewhere. On the 12th of July 1793 the Judges granted the motion. The matter thereafter came up for hearing on the 5th of November 1794, when the promovents (the East India Co.) proved their legal right to take such prizes, but no one appeared to oppose the application. The learned Judges condemned the vessel and the cargo as lawful prize. It would seem that the captors were entitled to the prize at the time and not the Crown. In the course of the proceedings in this case no reference seems to have been made to the case of *Hinchinbrook* above referred to. On the day that the decree was passed against *La Bien Aimée* similar decrees were passed condemning the brig *Nestor*, the schooner *Chandernagore* and the vessel *Bien Foisant*. Between November 1794 and 22nd January 1795 similar proceedings were taken against the ships, *America*, the *Enterprize*, and counsel who appeared to show cause admitted the jurisdiction of the Court but the petitions were dismissed as the Court was of opinion that the evidence was not sufficient to condemn them as prizes. But in the cases of *L'Helene* (20th April 1795) and *Diana* (8th Nov. 1796) the Court passed decrees of condemnation.

In none of the above cases do we find any considered judgments given. In Morton's Reports where they are to be found reported, the argument is noticed but no reasoned judgments are to be found in support of the orders.

The first case in which the question of jurisdiction of the Supreme Court at Calcutta in the matter of prizes was gone into by the learned Judges of that Court was in the matter of the frigate *La Forte* in 1799. There being war between England and France at the time, the English frigate *Sybille* brought the French frigate *La Forte* under capture to Fort William in Calcutta and applied in the Admiralty Division of the Supreme Court for its adjudication as lawful prize. Although this was done evidently because the Court had exercised jurisdiction in the cases referred to above, yet we do not find any reference to any of these cases either in the notes of argument or in the judgments delivered by the learned Judges, although the Chief Justice alluded to former precedents. The application was made by Burroughs, Advocate-General, who in his argument claimed jurisdiction for the Court by virtue of 13 Geo. III, Cl. 63 and Cl. 13 of the Supreme Court Charter which conferred on the Court full power and authority to exercise and perform all admiralty jurisdiction. He maintained that although the Court of Admiralty in England could not exercise its latent jurisdiction in prize matters unless it was empowered by the Lord Commissioners to act at the outbreak of every fresh war, yet the general terms of the Charter of the Supreme Court at Fort William obviated the necessity for the conferment of such special powers in the matter of prizes. He urged further that on ground of public policy and for public good such jurisdiction must be presumed to exist in the Court.

Anstruther, C. J., Royds and Russel, JJ., held that the Supreme Court of Judicature had no Prize Jurisdiction. The Chief Justice reviewed the history of the Prize Jurisdiction of the Court of Admiralty in England and held that as the Court of Admiralty in England could not then exercise jurisdiction in the matter of prizes unless a notification of a declaration of war by His Majesty was made, the Supreme Court having received no such notification it could not act as a Prize Court. This portion of the Chief Justice's judgment may lend some support to the view that the Prize Jurisdiction existed in this Court in dormant or latent condition which would become patent on a notification being issued of a declaration of war by His Majesty. As we are not aware whether a declaration of war had been notified to the Supreme Court Judges on former occasions, we are not in a position to say that the Prize Jurisdiction exercised by the Judges since the case of *Hinchinbrook* (that is in *La Bien Aimée* and subsequent cases) were improperly exercised.

Anstruther, C. J., like Sir Elijah Impey largely relied on his personal knowledge of the view entertained by those in authority in England on this question rather than on a proper interpretation of the law. His Lordship drew a distinction between the Ordinary Admiralty Jurisdiction and the Jurisdiction in the matter of Prizes.

It is quite true, as His Lordship maintains, that the Ordinary Admiralty Jurisdiction and Prize Jurisdiction are quite distinct in their very nature and character. In the former the Court has to administer the statute law. In the latter, the Judges may only act upon

the instructions of the King. No doubt both the matter of right and jurisdiction in respect of prizes arise out of the prerogative of the Crown. But when the Crown by Order in Council delegates the jurisdiction to the Admiralty Court to decide the question in accordance with the "course of admiralty," the law of nations and the principles of equity and justice, the Court exercising such powers is as much a judicial body as the Judicial Committee of the Privy Council. On the whole, however, the question of jurisdiction in the case of *La Forte* was rightly decided.

The next case we come across is in the Vice-Admiralty Court of Bengal in the matter of the ship *Edward Miles* (1825). In this case an application was made on behalf of the captors for monition, etc., but the Court (Sir Charles Edward Grey) rejected the application holding that in the absence of a Special Prize Commission, the Court had no jurisdiction. In the year 1837, however, an application was made in the Supreme Court in its Admiralty Jurisdiction on behalf of the officers, seamen, mariners and soldiers of H. M. ship of war, the *Andromache*, in the matter of claim for bounty under 6 Geo. IV, C. 49, for the capture of piratical ships and vessels. The application was for the taking of such evidence as the petitioners might adduce and that the same might be certified by the Court to the Commander-in-Chief of His Majesty's ships in the East Indies. The application was entertained by Sir Edward Ryan on the 30th of January 1837 as it was stated that the *Andromache* was about to sail immediately and that the evidence offered could not be obtained elsewhere. The Court admitted the petition, but the Commissary of the Vice-Admiralty Court intimated that by so doing the Court must not be understood to prejudge the question of jurisdiction which was reserved for the consideration of all the Judges of the Supreme Court as a Court of Admiralty. The 31st of January was assigned for moving in the matter and on that day Counsel for the petitioners moved that they may be declared entitled to a bounty of £1,445 under sec. 1 of Geo. IV, c. 49. On the 1st of February the Court (evidently through the Chief Justice who was His Majesty's Commissary of the Vice-Admiralty Court) expressed its opinion that the claim of the petitioners was proved to that extent and ordered "that a certificate of the said proof and proceedings should be made out and prepared by the Registrar, pursuant to the direction of the statute." It is thus evident that the Court did after all exercise jurisdiction in a matter falling strictly within Prize Jurisdiction. It is worthy of note that on the same 30th of January 1837 another application was made to the Supreme Court in the matter of prizes and the Court being doubtful whether the Court had jurisdiction on its Admiralty Side to entertain such matters under the general powers of the Charter directed the petition to be presented to the Chief Justice in person executing the office of His Majesty's Commissary of the Vice-Admiralty Court under the Commission of 1822.

In the same year another similar application was made on behalf of His Majesty's sloop, *Wolf*, but beyond examination of witnesses nothing was done in the matter, and the claim was eventually withdrawn from this Court and prosecuted in England. It is by no means clear whether the Supreme Court of Judicature at Calcutta as a Court of Admiralty prior to 1800 could exercise Prize Jurisdiction on the declaration of war with any country being made known to it by the Lords High Admiral in England without any Special Commission to the Court.

But by sec. 25 of the Government of India Act of 1800 (39 and 40 Geo. III) power was given for the issue of Commission from the High Court of Admiralty in England for the appointment of all or any of the Judges of the Supreme Court of Judicature at Fort William in Bengal or of similar Courts in Madras or Bombay, when created, for the trial or adjudication of Prize Causes.

We find that Commissions were issued in pursuance of the above statute on various occasions between 1808 and 1843 by which the Chief Justices for the time being were respectively appointed the Commissaries in the Vice-Admiralty Court of Calcutta and the territories thereto belonging. The Letters Patent of 1862 by its cls. 31 and 32 gave the same jurisdiction to the High Court at Fort William in Bengal as had been exercised by any Judge of the Supreme Court as Commissary to the Vice-Admiralty Court and also jurisdiction for "the trial and adjudication of Prize Causes." This jurisdiction was also continued by cls. 32 and 33 of the Letters Patent of 1865. But the jurisdiction so conferred must be read subject to sec. 25 of the Act of 1800 above referred to, which provided for the appointment of Commissaries by special authority under that statute. In the Commissions which had been issued under 39 and 40 Geo. III, the Chief

Justice for the time being was appointed under the designation of "Commissary of the Vice-Admiralty Court of Bengal and territories thereunto belonging." Under the Naval Prize Act of 1864 (27 and 28 Vict., ch. 25) the High Court of Admiralty in England was constituted a Prize Court for the whole of the British Dominions and every other Court exercising similar jurisdiction was comprised in the term "Vice-Admiralty Prize Courts." It also provides that all appeals from any decree or order of a Prize Court shall lie to the Judicial Committee of the Privy Council.

Under the Colonial Courts Admiralty Act, 1890 (53 and 54 Vict., Ch. 27) all Vice-Admiralty Courts were abolished and all Courts exercising unlimited Admiralty Jurisdiction was styled Admiralty Courts.

By the Prize Courts Act of 1894 (57 and 58 Vict., Ch. 39) sec. 25 of the Government of India Act of 1800 was repealed and it was provided that Commissions may be issued by His Majesty or the Admiralty for the constitution of Prize Courts in any part of British possessions even at the time of peace. Where a Prize Court has been constituted by such Commission in any British possession, upon the Vice-Admiral of such possession declaring under the instruction of His Majesty that war has broken out with any country, the Prize Court so constituted would commence exercising its jurisdiction in Prize matters. The Court which was constituted at the High Court of Fort William in Bengal upon the declaration of the present European War, derived its jurisdiction in the above manner. The Commission which we publish below was issued in January 1900 and upon the Viceroy and Governor-General of India who is His Majesty's Vice-Admiral in India declaring by notification in the *Gazette of India* that war had broken out between Great Britain and Germany on the 2nd of August last, the High Court at Calcutta under the terms of the Commission became vested with the jurisdiction of a Prize Court in this Presidency. The expression "course of Admiralty" both in the Commission of 1900 and the previous Commissions of the Supreme Court would indicate that the Prize Jurisdiction has to be exercised in the Admiralty Jurisdiction of the Court on the terms of the Commission being fulfilled. The further fact that the reports of Prize cases in the Calcutta Supreme Court as also the minutes of proceedings appear in the Admiralty Jurisdiction of that Court would go to support our view. The Commission above referred to is in the following terms :—

By the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

Her Majesty having been pleased by Her Commission, under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the tenth day of July in the sixty-third year of Her Reign, to authorise us to the effect following as by such Commission (a copy of which Commission is hereunto annexed) doth more at large appear: these are in Her Majesty's name and ours, to will and require the High Court of Judicature at Fort William in Bengal and you the Chief Justice of the said Court and all others the Judges or Judge for the time being of the said Court, or other the persons or person executing the duties of the Office of Judge of the said Court for the time being and you are hereby authorised and required from time to time upon any Proclamation being made by the Vice-Admiral for the time being of India that war has broken out between Her Majesty and any Foreign State, and not otherwise, to take cognizance of and judicially to proceed upon all and all manner of captures, recaptures, seizures, prizes, and reprisals of all ships, vessels and goods, which shall, on the outbreak of any such war, have been already seized and taken, and which shall thereafter be seized and taken, and which are, or shall be brought within the limits of the said Court, and all other matters of prize falling within the jurisdiction of the said Court, and to hear and determine the same, and according to the course of Admiralty and the Law of Nations, and the Statutes, Rules and Regulations in that behalf for the time being in force, to adjudge and condemn all such ships, vessels and goods as shall belong to the Foreign State named in such Proclamation, or to the subjects of such State, or to any others inhabiting within any of the Countries, Territories, or Dominions of the same, or which are otherwise condemnable as Prize and which shall be brought before the said High Court of Judicature at Fort William in Bengal for adjudication and condemnation And for doing the acts hereinfore mentioned this shall be your Warrant until the same is withdrawn or revoked.

Given under our hands and the Seal of the Office of Admiralty this twenty-fifth day of January 1900.

(Sd.) A. L. DOUGLAS.
(Sd.) A. W. MOORE.

To the Chief Justice of the High Court of Judicature at Fort William in Bengal and all others the Judges or Judge for the time being of the said Court, or the persons or person duly executing the duties of the Office of Judge of the said Court for the time Being.

By Command of their Lordships,
(Sd.) EVAN MACGREGOR.

CURRENT INDIAN CASES.

(CIVIL.)

Hindu Law—Joint family.

RAM CHARAN *v.* MEHTA LAL, I. L. R. 36 All. 158.

The manager of a joint family sold the joint

family property in order to raise money to meet the expenses of the marriage of the sister of himself and the Plaintiffs who were at the time minors and to carry on a shop which jointly belonged to him and the Plaintiffs.

Held—That the sale being by the manager of the joint property which belonged to him and his brothers and the transaction being for the benefit of the Plaintiffs it was binding on them although the manager was not the legal guardian of the Plaintiffs.

Evidence Act.

DALDEO DAS v. GOBIND DAS, I. L. R. 36 All. 161.

The Plaintiff sued for possession of a certain village which he said appertained to a temple. The Plaintiff's case was that the power to appoint a Mohant of that temple was vested in the Rajah of Ajaigarh and that the Raja duly appointed him Mohant. The Defendant traversed these allegations. It appeared that in the year 1840, there was a dispute about the appointment of the Mohant. The matter was referred to the kotwal for a report by the Political Agent.

Held That the report was admissible in evidence.

Civil Procedure Code (XIV of 1882), Chap. 22.

MATA PALAT v. BENI MADHO, I. L. R. 36 All 172.

The provisions of Chap. 22 of the Civil Procedure Code did not apply to any application subsequent to the decree.

Civil Procedure Code, Or. 21, rr. 35 and 95.

SARVI BEGAM v. TEJ BEGAM, I L. R. 36 All. 181

In execution of a money decree the judgment-debtor's share in a house was attached, put to sale and purchased by the decree-holder who applied to the Court for possession of the southern portion of the house stating that the judgment-debtor lived in that portion and another co-sharer occupied the other portion. When the amin went to deliver possession the judgment-debtor objected that as she held an undivided share in the house the decree-holder was not entitled to actual possession but only to formal possession

Held—That the provisions of Or. 21, r 95 may be read wtih those of Or. 21, r. 95, cl. (2), whenever it is a question of giving effective possession of an undivided share either to a decree-holder or to an auction-purchaser under a decree and the decree-holder was entitled to actual possession

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Transfer of Property Act (IV of 1882), secs. 50, 100.

JAWATHUR MAL v. INDOMATI, I. L. R. 36 All. 201.

The Plaintiffs sought to recover a sum upon part of a document which commenced by reciting that the executant had borrowed a certain amount and then there was a reference to certain property. There was a covenant to repay the amount with interest and there was a clause in the document where the executant undertook that until re-payment of the amount he would not transfer the property by sale or in any other way. There was in no part of the document any use of the word "hypothecate" or anything equivalent thereto.

Held per RICHARDS, C. J.—That the document was not a mortgage although it was sufficient to operate as a charge within the meaning of sec. 100 of Transfer of Property Act liable for the loan and created an interest in the person in whose favour the document was made but it was not a "transfer of an interest for the purpose of securing the payment."

Per BANERJI, J.—That the document was a simple mortgage within the meaning of the Transfer of Property Act, and therefore it could not be a charge within the meaning of sec. 100 of that Act. A charge under that section arises only when the transaction does not amount to a mortgage

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Civil Procedure Code, Or. 22, r. 4—Limitation Act, sec. 5.

SECRETARY OF STATE FOR INDIA v. JAWAHIR LAL, I L. R. 36 All. 235.

Sec. 5 of the Limitation Act is applicable only to cases to which besides the cases mentioned in the section itself it is made applicable by any other provision of law. That section is not made applicable to an application under r. 4, Or. 22.

Reviews.

Registration Act (XVI of 1908). By H. Holmwood, I. C. S. Rai Mohim Ch. Sarkar Bahadur & Sons, Calcutta, Publishers.

The Second Edition of the Law and Practice of Registration in India by the Hon'ble Mr. Justice Holmwood, Judge, High Court, Calcutta, is now before us. In this Edition the author has put in a large mass of case law drawn from all the Reports both official and non-official. The cases have been given under each section in their appropriate places and under proper headings which facilitate easy reference and minimise the trouble of the practising lawyers and also of the officers whose duty it is to administer the law on the subject.

The book should be particularly useful to Sub-Registrars as it contains the Rules and Orders published by the several Provincial and Local Governments. The book is complete in all its details, and we are glad to note that even Rules published by the Mysore and Mahekantha Agency have been incorporated. All the Acts which affect registration of documents such as the Transfer of Property Act, Trusts Act and other Acts have also been added to facilitate easy reference

Underhill's Law of Torts, Indian Edition. By M Krishnamachariar, M. A., M. L., Ph. D. Butterworth & Co., London. Butterworth & Co. (India), Calcutta.

The book under notice is the Indian Edition of Underhill's well-known treatise on the Law of Torts. The present edition adding, as it does,

the case law that has accumulated in this country on the subject of torts very considerably enhances the value of the work to students and practitioners in India. The present editor has very wisely followed as closely as possible the plan and arrangement of the original work, and his notes are characterised by a clearness and brevity which do him credit. He has also pointed out where the law of torts in India has not strictly followed the English Law on the subject and also where the latter has been rendered inapplicable in this country as the result of specific legislative enactments. The get-up of the book is excellent and it is besides very handy.

Notes of Cases

ENGLISH LAW COURTS.

CHANCERY DIVISION—Before MR. JUSTICE SARGANT. **Princess Thurn and Taxis v. Moffit.** 16th October 1914.

Alien enemy's right to sue.

The Plaintiff alleged that she was the wife of the Prince of Thurn and Taxis. She sought to restrain the Defendant from continuing libels to the effect that she and not the Plaintiff was the real wife of the Prince. The Defendant contended that the Plaintiff being an alien enemy was disentitled to relief in British Courts.

MR JUSTICE SARGANT in the course of his judgment held—"The Plaintiff was originally an American lady and she had become an alien by her marriage. She was residing in this country now and when the war began and she had duly registered herself under the recent Act which with the proclamations under it amounted to a command to stay in this country and within a particular area. The law was correctly stated in Hall's International Law, p. 388, as follows: -

"When persons are allowed to remain either for a specified time after the commencement of war or during good behaviour they are exonerated from the disabilities of enemies for such time as they in fact stay and they are placed in the same position as other foreigners except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country."

That proposition was supported by the case of Wells v. Williams (Salkild 46; 1 Lord Raymond 282) * * * * The right sought to be enforced was an individual right and not a right claimed through the Plaintiff's husband and she had by the Act and her registration under it the right to enforce her claim notwithstanding the state of war existing between this country and her own.

Mr. Maurice Barnett for the Defendant.

Mr. M. A. McCardie for the Plaintiff.

Solicitors: Messrs. Harrington Edwards and Cobban for the Defendant.

Messrs. Carter, Harrison and Armstrong for the Plaintiff.

KING'S BENCH DIVISION.—Before MR. JUSTICE BAILHACHE. **Robinson & Co. v. Continental Insurance Company.** 16th October 1914.

also **Alien enemy's right to defend an action.**

Admiralty ...

The facts as also the law will appear from the following portion of His Lordship's judgment.

In this case the Defendant Company apply for the postponement of the hearing of the action on the ground that the company is an alien enemy. The action is brought upon a policy of marine insurance effected on behalf of the Plaintiffs who are British subjects with the Defendant Company. The loss was before the war and the pleadings were closed before the war. The war has had the effect of making the Defendant Company an alien enemy and the Defendant Company contend that that fact of itself entitles the Company to a postponement of the trial. The contention is that by the Common Law of England all actions between British subjects and alien enemies are suspended during the war and further that an alien enemy cannot appear and cannot be heard in our Courts during hostilities.

There is, I think, abundance of authority for the proposition that an alien enemy, if objection be taken by the Defendant, cannot sue as Plaintiff in our Courts and cannot proceed with an action pending in these Courts while the state of hostilities which makes him an alien enemy lasts. Whether he can sue or proceed with his action, if no objection be taken by the Defendant, is perhaps open to doubt. It is I think equally true that a Defendant alien company cannot during the war prosecute a counter-claim. Does the converse hold good and does the same rule obtain when an alien enemy is Defendant?

* * * * *

To hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief.

* * * * *

I am of opinion that the rule is confined to cases in which the alien enemy is Plaintiff and that war does not suspend an action against a Defendant alien enemy.

The next question is—can he appear and defend either personally or by counsel? I think he certainly can.

* * * * *

I have come to the conclusion that there is no rule of the Common Law which suspends an action in which an alien enemy is Defendant and no rule of the Common Law which prevents his appearing and conducting his defence.

Mr. Theobald Mathew for the Defendants.

Mr. W. N. Raeburn for the Plaintiffs.

Solicitors: Messrs. Lawless & Co. for the Plaintiffs.

Messrs. Waltons & Co. for the Defendants.

THE CALCUTTA WEEKLY NOTES.

REPORTS.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

APPEALS NOS. 58, 65 AND 66 OF 1913.

JENKINS, C. J.
STEPHEN, J.
1914,
Heard, 22, 23, 24, 27, 28, April, 12, 13, 14, 15, May.
Judgment, 19, May.

G. S. HANNAH and anr., Defendants, Appellants,
v.
MESSRS. JAGANNATH & Co. and ors., Plaintiffs, Respondents.

Trade-mark, law of, in India—Common Law of England as to Trade-mark—Trade-mark if assignable or may descend in gross—Trade mark when and how assignable—Trade-mark when personal and inalienable—Trade-mark in selection of natural products—Trade-mark and good will of business—Good-will, what is—License to use trade-mark—Licensee if may question title of the licenser of the trade-mark—Indian Evidence Act (I of 1872), sec. 117—Estoppel—Merger—Contract, wrongful rescission—Public policy and contract—Partner's liability in respect of partnership debts and obligations prior to becoming partner.

In India the law of trade-mark is not governed by statute and there is no statutory system of registration. The rights and liabilities in connection with trade-marks are determined by reference to the Common Law of England.

BRITISH AMERICAN TOBACCO CO., LD. v. MAHBOOB BUKSH (1) *referred to.*

A trade-mark cannot be assigned or descend in gross.

The trade-mark in this case was not so personal as to be inalienable.

A selector of a natural product like jute may have a trade-mark in his selection and the mark in such cases is indicative of the quality certified by the selector.

MAJOR BROTHERS v. FRANKLIN (2) *referred to.*

A trade-mark can only be assigned together with the good-will of the business to which it relates.

Where the trade-marks along with the business of jute-baler were sold by the executors and heirs of the proprietor, the legal requirement for the valid transfer of trade-marks was satisfied.

The good-will of a business is the benefit and advantage of the good name, reputation and connection of a business.

INLAND REVENUE COMMISSIONERS v. MULLER AND CO.'S MARGARINE LD. (3), *referred to.*

A transferee of the good-will of a business would be entitled to use the name in which the business was carried on and represent himself as carrying on that business.

When the Plaintiffs, the transferees of the trade-marks and business of a jute-baler, gave a license to the Defendants, the right to use and to authorise others to use exclusively the trade-marks and to hold the good-will of the business of original jute-baler and the marks without any interference by the proprietors for a particular period on the payment of certain royalty and the Defendants sought afterwards to repudiate their obligation under the agreement alleging that the Plaintiffs' title to trade-marks was illegal and invalid:

(1) I. L. R. 38 Cal. 110 (1910).

(2) L. R. (1908) 1 K. B. 712

(3) L. R. (1901) A. C. 217 at p. 223.

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Held *that under sec. 117 of the Indian Evidence Act a licensee cannot be permitted to deny that his licensor had at the time when the license commenced authority to grant such license.*

Sec. 117 would, at any rate, cast on the Defendants the burden of proving the plea that was taken by the Defendants, viz., *that the good-will of the business had lost its separate existence by merger and that the Plaintiffs had not the authority they professed to exercise.*

These were three consolidated appeals by G. S. Hannah and C. L. Smallwood of Haworth & Co., E. C. H. Cresswell and Smyth of Moran & Co., and Geoffrey Watson, Defendants, against the judgment and decree of Mr. Justice Imam in favour of Messrs. Jagannath & Co., Plaintiffs, and their cross-objections.

The facts of the case fully appear from the Judgment of Mr. Justice Imam which was as follows :—

IMAM, J.—This suit is brought by a Marwari firm of jute-balers of the name of Jagannath & Co., against the several members of two other firms of jute-balers, *viz.*—Moran & Co and Haworth & Co., asking for damages from the Defendants on account of breaches of their covenants in respect of certain jute trade-marks of which the Plaintiff firm are the owners and Moran & Co. and Haworth & Co. are the licensees and sub-licensees respectively and for payment of royalty in respect of the trade-marks for the season 1912-13.

The Defendants Cresswell, Smyth and Watson are members of the firm of Moran & Co. while the Defendants Hannah and Smallwood are members of the firm of Haworth & Co.

The Plaintiff firm purchased some trade-marks of which 4 are in suit, from one Gokul Chand Khettan on 3rd April 1908. The marks originally belonged to one S. C. Chatterjee who carried on a jute-bailing business. On his death the marks were assigned by his widow, as executrix of his will, and his heirs as beneficiaries under the will, on 24th September 1904 to Messrs. Landale and Morgan with the good-will of the business for a sum of Rs. 75,000. The latter thereafter on 26th September 1904 assigned the trade-marks with the good-will of the business to Harsookdas Doolichand for a sum of Rs. 85,000. On 8th May 1907 Dooli Chand transferred the trade-marks with the good-will of the business to Gokul Chand Khettan for a consideration of Rs. 3,50,000, and he in his turn assigned the trade-marks with the good-will of the business to the Plaintiff firm in lieu of Rs. 1,90,000 on 3rd April 1908.

On 24th September 1910 Jagannath & Co. gave a license in respect of 4 out of the 7 trade-marks to Moran & Co. to use and employ the said marks for a period of one jute season, that is up to 30th June 1911. On the expiration of that period a second license was obtained by Moran & Co. from Jagannath & Co. by a deed of agreement dated 8th July 1911 for a period of 3 jute seasons extending up to 30th June 1914. The annual royalty for the use of the marks was fixed at Rs. 23,000 in instalments of Rs. 10,000, Rs. 5,000, Rs. 5,000 and Rs. 3,500 payable on dates mentioned in the deed. The agreement purports to grant a license to Moran & Co. to use and employ the said 4 marks for a period of 3 years and to hold for the said period the good-will of the business of S. C. Chatterjee, the original baler of the marks, as far as the said marks are concerned. The claim for damages in this suit is based on the stipulation contained in clauses 4 and 7 of the deed. I quote the clauses hereunder.

Cl. 4.—" The licensees do hereby undertake that the quality of jute packed under the trade-marks set forth hereunder in the schedule respectively shall at no time be inferior to the quality of the jute packed under any corresponding trade-mark which is included in the group of trade-marks which is recognised by the London Jute Association and in which group that mark is, and of which groups the 3S mark stands in the group which is known in the jute trade as the "six marks group " of " First " marks, and shall at all times indemnify and keep indemnified the proprietors to the fullest extent from and against all losses, costs and damages and expenses which the proprietors may

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incur, suffer, sustain or be put to, by reason of or on account of the standard of the trade-marks hereby licensed to the licensees having been lowered below the standard of any of the corresponding marks of the group in which the mark is or by reason of any breach on the part of the licensees or any persons working under them or any of their nominees of any of the terms and conditions of these present."

Cl. 7.—"If at any time any of the marks set forth in the Schedule hereunder shall be removed from the group of trade-marks recognised by the London Jute Association in which the same now is owing to the said marks having been used upon jute of inferior quality or owing to the breach by the licensees or their nominees or assigns of any of the terms and conditions of the agreement or of any of the Rules and Regulations of the Calcutta or London Jute Association or non-compliance with any of the requirements of the said Association as regards the quality of jute to be packed under the said marks hereby leased or otherwise then the licensees shall indemnify the proprietors by payment of all damages, costs, losses and expenses which they may suffer or incur by reason of the said marks having been removed from the group of marks in which the said trade-mark now is."

By an indenture dated the 1st March 1912 Moran & Co. with the concurrence of Jagannath & Co. transferred to Haworth & Co. their rights in respect of the marks under their license, Haworth & Co. agreeing on their part to pay the royalty and to perform and observe the covenants and stipulations contained in the license.

In 1911, sometime prior to the 1st of July, the London Jute Association had issued a circular declaring their decision to adopt "Association Groups" with the object of encouraging the better and more regular baling of jute in which were to be included those marks baled by Indians of which the quality had been as nearly as possible in accordance with the guarantee of the contract. By this circular the London Jute Association adopted or proposed to adopt seven groups of marks, *viz.*, Reds, Firsts, Daccas, lightnings, Mangos, Hearts and Daisee. Of the 4 marks in suit 4S in a red circle, 3S in a black circle, 3S in a red circle, and 3S in a heart were placed in the groups Reds, Firsts, Mangos and Hearts respectively.

In 1912 by their circular dated 8th May 1912 the London Jute Association finally decided on their "Association Groups" and retained only 6 instead of 7 groups striking out the groups "Reds" altogether and in none of these 6 groups was any of the marks in suit included.

On the 29th June 1912 Haworth & Co. by their letter of that date gave notice to Jagannath & Co. that in the events that had happened they would not carry out the contract signed by them. On 2nd July 1912 Messrs. Leslie and Hinds attorneys on behalf of Haworth & Co. and Moran & Co. informed Jagannath & Co. that neither of the two firms was bound by the agreement and that they declined to carry out the same.

The Plaintiff firm maintain that Moran & Co. and Haworth & Co. or either of them permitted jute of inferior quality to be packed under the marks or otherwise committed breaches of the Rules and Regulations of the London Jute Association wherefore the said marks have been removed from their respective groups and that by reason of such exclusion the marks have become practically valueless and the Plaintiff firm have suffered heavy damages which they assess at Rs. 3,50,000. The Plaintiff firm further claim that the Defendants were bound by their agreements to pay to the Plaintiff the royalty by the instalments mentioned in their deeds which they have not done.

The Defendants Cresswell and Smyth aver that the marks in question are yet in the groups in which they were; that the groups mentioned in the deed of agreement have no reference to the groups adopted by the London Jute Association; that they are not in any manner responsible for the exclusion of the marks from the London Jute Association groups; that it is not true that the marks have become practically valueless; that they have not been guilty of any breaches of the agreement nor have the Plaintiff firm sustained any damages by reason of any act or default of the Defendants; that the Plaintiff firm are not the legal proprietors of the marks, and that the agreement dated 8th July 1911 is illegal, in-

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valid and void as being contrary to public policy.

The Defendant Watson pleads that he is not liable to the Plaintiff firm as he became a partner in the firm of Moran & Co. on 1st April 1912 which was a long time after the agreement of 8th July 1911; that there was no agreement between him and the Plaintiff firm in respect of the marks; and that the agreement dated 8th July 1911 is illegal, invalid and void as being contrary to public policy.

The defence of the Defendants Hannah and Smallwood is substantially the same as that of the first two Defendants.

The first question that I have to consider is whether the Defendants can be allowed to deny the Plaintiffs' title. The contract between the owner of a trade-mark and his licensee is like a contract between a landlord and his tenant and as between landlord and tenant so between licensor and licensee the former's right cannot be questioned.

In *Clarke* v. *Adie* (4), which was a case of a patent, Lord Blackburn said:—"Although a stranger might shew that the patent is as bad as any one could wish it the licensee must not shew that" and in the same case Lord Cairns observed:—"So far as he is concerned he must stand here admitting the novelty of the invention, admitting its utility and admitting the sufficiency of the specification." In an earlier case *Glover and Baker Sewing Machine Co.* v. *Millard* (5), Wood V. C., held that the fact of a patent having been found invalid at law in an action between the patentee and a third party could not be set up against the patentee by his licensee in a suit upon the same patent. The licensee of a trade-mark is in the same position as the licensee of a patent. But it has been urged on behalf of the Defendants that they having repudiated the contract the relation of licensor and licensee no longer subsists between the Plaintiff and them. This proposition fails to take notice of the other party to the contract whose concurrence to terminate the contract is as [illegible]tial as that of these Defendants. Here [illegible] be aptly quoted the words of Lord Esher M. R. in *Johnstone* v. *Milling* (6). "When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission." In the present case the Plaintiff firm are holding to the contract and therefore the parties must be treated as governed by a subsisting contract. So long as the Plaintiff firm are excluded from claiming for infringement of their trade-marks against the Defendants by reason of the license their right cannot be brought under discussion at the instance of those that have the permission to use the trade-marks. The Defendants as licensees and sub-licensees are precluded from questioning the Plaintiffs' right.

The next question to which I am asked to direct my attention is the validity of the agreements dated 8th July 1911 and 1st March 1912. The Defendants object to these agreements on three grounds:—

Firstly, that the marks in suit were originally the property of S. C. Chatterjee whose skill in selecting jute secured for his goods a reputation that was associated with his name and therefore his trade-marks being personal could not be assigned. Secondly, that the license in respect of the trade marks in question does not carry with it the goodwill of the business of S. C. Chatterjee and Thirdly, that the license covering as it does only 4 out of 7 trade-marks must be invalid as there is no divisibility in trade-marks.

For the first objection, before it is ruled in the Defendants' favour, the consideration arises if the trade-marks are so completely personal to S. C. Chatterjee as of necessity to import that the goods packed under them have been manufactured by him. In *Hoxie*

(4) L. R. 2 A. C. 423 at p. 436 (1877).
(5) 9 Jur. N. S. 713.

(6) 16 Q. B. D. 460, 467 (1886).

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v. *Chaney* (7), the Supreme Court of Massachusetts expressed the principle involved here in the following terms:—"There may, no doubt, be cases where the personal skill of an artist or artisan may so far enter into the value of a product that a trade-mark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and in such cases it would be a fraud upon the public if the trade-mark should be used by other persons and for this reason such a trade-mark would be held to be unassignable. But on the other hand, the usages of trade may be such that no such inference would naturally be drawn from the use of a trade-mark which contains a person's name and that all that purchasers would reasonably understand is that goods bearing the trade-mark are of a certain standard, kind, or quality or are made in a certain manner or after a certain formula, by persons who are carrying on the same business that formerly was carried on by the person whose name is in the trade-mark." There is a long series of English decisions to the effect that the mere name of the maker will be deemed to be indicative rather of a business in whosesoever hands it may be, than of an individual proprietor of it, and indeed the evidence on either side, in this case, is unambiguous that these trade-marks are merely indicative of a certain standard of quality associated with the good-will of the business of S. C. Chatterjee. For the defence, reliance is placed on the provision of law that an agreement that is opposed to public policy is void. But "public policy," it has been said, "is always an unsafe and treacherous ground for legal decision" per Lord Davey, *Janson* v. *Driefontiey* (8), and Sir George Jessel remarked in *Printing and Numerical Registering Company* v. *Sampson* (9), "it must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that a man of full age and competent understanding shall have the utmost liberty of contracting and that therir contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract." It is for the Defendants to show that the agreements are opposed to public policy and this they have failed to do.

The second objection is not borne out by the deed of agreement dated 8th July 1911 as it covers the trade-marks and the goodwill alike. The 9th clause of the deed runs thus:—

Cl. 9.—"The licensees having paid the said royalty hereby reserved and otherwise complying with and conforming to all the terms and conditions of this agreement shall and may at all times during the said term peaceably and quietly use or employ or permit others to use or employ exclusively the said trade-marks and to hold the good-will of the business of Surjoo Chandra Chatterjee the original baler of the said marks as far as any of the said marks are concerned without lawful interruption or interference by the proprietors."

The third objection is also not tenable in my opinion. The original baler, it is true, owned 7 trade-marks in connection with his business but it appears that the three marks, that have not been the subject of the license, have not been in use since the first assignment in 1904. Mr. Donetil, a witness for the Defendants, has stated that the 4 marks in suit, known as the range of S marks, were being packed during the last 8 or 10 years while the other marks were never offered in such quantities as to make them noticeable; and Ramjidas, a member of the firm of Jagannath & Co. has in his deposition stated that from the date of Exhibit Y1 (*i.e.* the first assignment dated 24th September 1904) to the date of the first license to Moran & Co. (24th September 1910) no jute was packed under the other three marks. No evidence has been tendered on behalf of the defence to show that the three marks in question had not fallen into disuse. In the absence of such evidence abandonment of the marks has to be held on the statements of Mr. Donetil and Ramjidas. In *Lavergne* v.

(7) 143 Mass. 592; 58 Amer. Rep. 149.
(8) [1902] A. C. 484, 500.
(9) L. R. 19 Eq. 462, 465 (1875).

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Hooper (10), the learned Judges (Turner, C. J. and Muttusami Ayyar, J.) pointed out that as the right to a trade-mark might be acquired so it might be abandoned and that as no length of time was required for the acquiring of a right to a trade-mark, in like manner, apart from statutory law, no length of time was required to constitute an abandonment. In the present case all the circumstances point to the three marks having fallen into disuse and I can not hold that the four trade-marks in suit could not be dealt with without the other three marks.

Apart from the view I have taken of the second and third objections I do not think they can be raised by a licensee against his licensor because the consideration for the promise to pay the stipulated royalty is the permission to use the trade-marks and so long as the two agreements afford an excuse for an infringement it is not open to the licensee to avoid his liability by such objections. Considerable stress has been laid on the authority of the case *British American Tobacco Co., Ld.* v. *Mahboob Buksh* (1), but the principles explained there have no application to the considerations that govern this case.

On behalf of the Defendants Hannah and Smallwood it was urged at the time the issues were framed that the Plaintiff firm first verbally and then by recital in the agreement untruly represented in a manner not warranted by their information that they were the owners of the trade-marks and thus by misrepresentation induced the agreement dated 1st March 1912

No evidence of any misrepresentation has been adduced and there is nothing in the deed itself that can be pointed out as untruthful. In this connection it has been argued by the defence that the assignments by Landale and Morgan to Harsookdas Doolichand and by the latter to Goculchand Khettan were not valid as when Landale and Morgan had the good-will and the marks assigned to them, they were carrying on jute baling business of their own and in their business the business and trade-marks of Surjoo Chandra Chatterjee got so completely merged that they lost their identity and thus the assignment of the 7 marks with Chatterjee's good-will not being an assignment of the whole business of Landale and Morgan was invalid. Similar argument has been pressed in respect of the assignment by Harsookdas Doolichand to Gocoolchand Khettan. There is no authority for such a proposition nor does it appear to me as sound. The evidence shews that Landale and Morgan and Harsookdas Doolichand on their respective assignments treated the good-will with the trade-marks of S. C. Chatterjee as their property separate from their existing business. The several transactions of mortgage and reconveyance between them bear out this view.

For the reasons I have stated above I hold that the agreements dated 8th July 1911 and 1st March 1912 are legal, valid and operative.

I now come to the Plaintiffs' claim for damages. It is admitted on behalf of the Defendants that the marks though included in the "Association groups" proposed or adopted in 1911 find no place in the "Association groups" in 1912 but they say that their license has no reference to "Association groups" but to certain trade groups recognised but not established by the London Jute Association. A reading of cls. 4 and 7 of the deed of agreement dated 8th July 1911 bears out the Defendants' contention. The trade had established certain groups of marks for their own facility and the London Jute Association merely recognised those groups and it was not till 1911 that the Association decided to adopt groups of their own. The Association for their groups adopted the names given by the trade but made certain alterations in their constitution The marks in suit were in certain groups established by the trade, the mark 38 in a black circle being in Firsts that was commonly known as "six marks group" consisting of 6 marks only. The trade then extended the 6 marks into 8 marks and thereafter there existed the 6 marks group and 8 marks group contemporaneously. When the Association inaugurated or proposed their own groups in 1911 they included 10 marks in the group known as "Firsts." Thus they never had any group consisting of 6 marks in the Firsts. The 4th Clause of the deed clearly refers to

(1) I. L. R. 38 Cal. 110 (1910).
(10) I. L. R. 8 Mad. 149, 174 (1884).

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"6 marks group" and it will be a stretch of meaning to construe it as referring to the Association's Firsts. The same cls. 4 and 7 are found in the first license, the deed of agreement dated 24th September 1910, and no one can say that in that deed "Association groups" were meant as in 1910 the Association had introduced no groups of their own at all. I am asked by the learned counsel on behalf of the Plaintiffs not to construe the second license by reference to the first, but when the language employed in the two licenses is identically the same the first license has a considerable bearing on the second. For the Plaintiffs attempt has been made to establish that since the inauguration of "Association groups" the 6 marks group has ceased to be. In this however they have completely failed as the evidence of Mr. Donetil and Mr. Macleod who is the Chairman of the London Jute Association leaves no room for doubt that the trade yet deals in 6 marks group which exists side by side with Association groups. No evidence has been adduced by the Plaintiffs to show that the marks in suit have been removed from the trade groups in which they were. My view therefore is that the indemnity in the agreement does not relate to group or groups of marks established by the London Jute Association and that the claim for damages is not sustainable. I may here mention that in no case could a claim for damages lie against the Defendants Hannah and Smallwood as nothing has been pointed against them that could lead me to hold that they are in any wise responsible for the removal of the marks even from the Association groups.

The Defendant Watson pleads that he is not liable to the Plaintiff as he became a partner in the firm of Moran & Co. after the agreement and there was no contract between him and the Plaintiff. It is no doubt a rule of law that a person admitted as a partner into an existing firm does not by his entry become liable to the creditors of the firm for anything done before he became a partner but an agreement by an incoming partner to make himself liable to creditors of the firm before he joined it, may be, and in practice generally is, established by indirect evidence. The Courts, it has been said, can presume in favour of such an agreement and are ready to infer it from slight circumstances. See *Ex parte Jackson* (11), *Ex parte Peele* (12), and *Rolfe* v. *Flower* (13). The evidence in this case however appears to me not slight but cogent to fix the liability on all the members of the present firm of Moran & Co. The Defendant Watson entered into partnership with Messrs. Cresswell and Smyth in the firm with the knowledge of the liability to Jagannath & Co. in respect of the jute marks and in the deed of partnership dated 18th October 1911 by which he became a partner the language employed in cl. 12 of that deed leaves no doubt in my mind that he is equally liable to the Plaintiff firm though he may be entitled to be indemnified by Mr. Cresswell for any demands that he may have to satisfy in respect of these marks. The deed of agreement dated 8th July 1911 by which Messrs. Moran & Co. were licensed to use the trade-marks clearly mentions "all the present and future members" of that firm on whom the agreement would be binding and it was with this knowledge that Mr. Watson entered into partnership of that firm.

My conclusion therefore is that the Plaintiff firm are entitled to their royalty from all the five Defendants as claimed in the plaint and the suit is decreed to that extent while the claim to damages cannot be allowed and the suit to that extent is dismissed.

As regards costs, general costs of suits are allowed to the Plaintiff. The Defendants are entitled to such costs of hearing as are occasioned by reason of joinder of claim for damages. They are further entitled to one day's costs for the adjournment occasioned by the failure of the Plaintiff to disclose certain document in their affidavit of documents. The rest of the costs of the hearing the Plaintiff firm are entitled to. I am asked by the learned counsel for the parties to apportion the costs of hearing as a reference to the Taxing Master will entail hearing expenses on them. All costs before the actual hearing are to be borne by the Defendants. From the day the case was

(11) 1 Ves Jun. 131.
(12) 6 Ves. 602 (1802).
(13) L. R. 1 P. C. 27 (1865).

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opened to the day when the argument of the Plaintiff was concluded there were 19 days of hearing. Of these, on an examination of the record I assess four days to have been spent on account of the joinder of the claim for damages and the costs of hearing of these days the Plaintiff must pay to the Defendants while the latter must pay to the former the costs of 14 days of the hearing, the costs of one further day occasioned by the adjournment being payable to the Defendants from the Plaintiff. There will be the usual set off between the parties. The Defendants will get only one set of costs between them. The costs will be on scale 2.

Mr. S. P. Sinha with *Mr. W. Gregory* for Messrs. Hannah and Smallwood the Defendant Appellants in appeal No. 58 of 1913.

Messrs. H. D. Bose, *B. C. Mitter* and *A. N. Chaudhuri* for Messrs. Jagannath & Co. the Plaintiff Respondents, in appeal No. 58 of 1913, also for the Plaintiff Respondents in appeals Nos. 65 and 66 of 1913, also in support of cross objectoins.

Messrs. Buckland and *Langford James* for Messrs. Cresswell and Smyth, Defendant Appellants in appeal No. 65 of 1913 and Respondents in the two other appeals.

Messrs. Aretoom and *Hyam* for Mr. Watson, Defendant Appellant in appeal No. 66 of 1913.

Mr. Sinha. The question is whether certain marks let by the Plaintiffs to the Defendants Moran & Co. and then to Defendants Haworth & Co. are trade-marks or quality marks. If they are quality-marks they are not assignable, as there was no consideration If they are trade-marks it would be a fraud upon the public to lease them out. The contention of the Appellants in the lower Court was that it came under *British American Tobacco Co., Ld.* v. *Mahboob Buksh* (1). Plaintiff gave instructions to his attorney with I. L. R. 38 Cal. in his hands. *Vadilal Sakalchand* v. *Burditt & Co.* (14). Refers to where they deal with quality mark. What is the consideration for my agreement? It would not lie in his mouth to say "if you choose to take it you must pay for it." They say that they are not only quality-marks, but also trade-marks. If the Plaintiffs cannot make out that they have a right such as they claim to have they cannot get any remedy against me. The marks are not assignable irrespective of business. Sebastian on Trade-marks (5th Ed.), p. 116 (at p. 117, and note), *Rey* v. *Leconturier* (Chartreuse case) (15).

[JENKINS, C. J.—In England, it is quite different. Here in this country, there is no system of registration of trade-marks. Is it not a right of sufficient value to pass on a grant?]

Mr. Sinha.—The probability therefore of deception is much greater in this country.

[STEPHEN, J.—According to you it is open to any body to use those marks.]

Mr. Sinha.—Yes. Even if they are trade-marks they are not assignable. With regard to leasing, it is quite illegal.

[JENKINS, C. J.—Would you not be liable criminally, if you used those marks, if they are not assignable and you used them?]

[STEPHEN, J.—Refers to sec. 478, I. P. C.]

Mr. Sinha.—The precise point is "Is a license of a trade-mark legal or is it absolutely illegal?" Sebastian (5th Ed.), p. 607. (The text of the Act with notes. Secs. 70, 80, note *c* (pp. 629-630). Kerly (4th Ed.), Chap. XIII (p. 394). *Oldham James* (16), *In re Roger* (17),

(1) I. L. R. 38 Cal. 110 (1910).

(14) I. L. R. 30 Bom. 61 at p. 71 (1905)
(15) [1905] 2 Ch. 717; [1907] 25 P. R. 265; H. L. (1910) 27 P. R. 268.
(16) 13 Ir. Ch. 393; 14 Ir. Ch. 81 (1862)
(17) (1895) 12 R. P. C. 149, 158.

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Boussod Valadon & Co. v. *Marchant* (18). The Plaintiffs' case is they are the proprietors of these marks and the consideration is the permission to use the marks under his lease or sub-lease. Assuming that the Plaintiffs are the proprietors, the license is unnecessary, illegal. Kerly, Ch. XIV, pp. 404, 405. The marks were descriptive and not distinctive. *Hall* v. *Barrows* (19), per Lord Westbury at p. 154. *Millington* v. *Fox* (20).

[JENKINS, C. J.—Refers to *Reddaway* v. *Banham* (21) per Lord Herschell at p. 209. You say the mark is a quality-mark and that it is a common property. Is there any evidence that they had acquired a considerable reputation as their trade-mark in common law?]

Mr. Sinha.—There is no evidence beyond that the 6-marks groups acquired considerable reputation. Therefore the assignment is meaningless.

[JENKINS, C. J.—Refers to *Saxton* v. *Dodge* (22), referred to in Bigelow on Estoppol, 6th Ed., p. 599.

Mr. Sinha.—These marks indicate only goods of a particular quality. *Thorneloe* v. *Hill* (23), per Mr. J. Romer at p. 577. Are these people entitled to evade the rule with regard to the passing off of the goodwill with the trade-mark and perpetuate a fraud on the whole world by a "mere verbal compliance" with the rule as dealt with in 38 Cal. 110?

All these cases prove that a trade-mark cannot be assigned in gross. You cannot assign 4 out of 7 marks by letting 3 others go. It is an indication of the unreality of the transaction. The whole thing was founded on illegal consideration and the agreement is therefore void and illegal.

Mr. Buckland—Adopted Mr. Sinha's argument.

Mr. Avetoom—Adopting Mr. Sinha's argument says, that so far as Watson is concerned, the only question is whether in any case Watson was liable, he having become a partner of the firm of Messrs. Moran & Co. after the agreement with the Plaintiff company was entered into.

Mr. B. C. Mitter.—The Defendants take advantage of the assignment of the trademarks to them and pocket the profits and when they find that they are losing, they try to evade the agreement by seeking protection of the decision in 38 Cal. Take the analogous case of Patents (*see* Terrell on Patents, p. 205), also Bigelow on Estoppel, p. 598. The doctrine of Estoppel applies, the Defendants being my licensees.

[JENKINS, C. J.—*Ex-hypothesi*, they are not your licensees because you have not got any property in the marks.]

Mr. Mitter.—A trade-mark is transmissible by death, etc., unless it operates as a fraud on the public. I rely on every word of Lord Westbury in *Hall* v. *Barrows* (19), and shall place *Vadilal Sakalchand* v. *Burditt & Co.* (14) side by side with this case. It is my property. *Leather Cloth Co., Ld.* v. *The American Leather Cloth Co., Ld.* (24), *Singer Manufacturing Co.* v. *Loog* (25) per Blackburn L. G., *Singer Manufacturing Co.* v. *Wilson* (26) (per Lord Cairns), *Orr Ewing* v. *Johnston* (27), *Bourne* v. *Swan and Edgar, Ld.* (28) (Farwell, J.), *Edelsten* v. *Edelsten* (29). Let

(18) (1908) 25 R. P. C. 42, 53.
(19) 4 DeG. J. & Sm. 150: 46 E. R. 873 (1863)
(20) (1838) 3 My. & Cr. 338.
(21) [1896] A. C. 199.
(22) 57 Barb 84.
(23) [1894] 1 Ch. 569 at p. 577.

(14) I. L. R. 30 Bom. 61 at p. 74 (1905).
(19) 4 DeG. J. & Sm. 150; 46 E. R. 873 (1863).
(24) (1863) 4 DeG J. & Sm. 137.
(25) 8 A C. 15, 33 (1882).
(26) 3 A. C. 376, 391 (1877).
(27) 13 Ch. D. 434 (1879).
(28) [1903] 1 Ch. 211, 228.
(29) 1 DeG. J. & Sm. 185; 46 E. R. 72 (1863).

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us see what is meant by good-will? It means the right to deal with jute of these marks.

[JENKINS, C. J.—When it is made to appear that the Plaintiff had no right of property?]

[JENKINS, C. J.—*Chanter* v. *Leese* (30).]

Mr. Mitter.—Terrell on Patents, p. 205.

[JENKINS, C. J.—Kerly (Ed. IV), p. 39. *Edwards* v. *Dennis* (31).]

Mr. Mitter.—He can certainly deal in jute but not in jute with the same mark and quality. Sebastian, p. 333, *Levy* v. *Walker* (32), Sebastian p. 334, note (*g*), *Potter* v. *The Commissioners of Inland Revenue* (33), Sebastian p. 335, note (*g*), *Trego* v. *Hunt* (34), Sebastian p. 337, note (*c*), *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.* (3), Sebastian p. 342, note (*c*), *Burchell* v. *Wildie* (35), Sebastian p. 342 last para. "good-will of a trade" with notes (*d*, *e*, *f*, *g*) and pp. 343, 344, 345, 346.

[JENKINS, C. J. -In this case would Haworth & Co. be entitled to trade as Jagannath & Co.?]

Mr. Mitter.—No. But they are entitled to trade as S. C Chatterjee & Co. if they think they would profit by it. Sebastian, pp. 360-361. "Firm continued by certain partners." Mr. Mitter then discussed the 38 Cal. case and distinguished it from the present case. There is no illegality, as I have not compelled the Defendants to use these marks to deceive the public. Public will be deceived if the standard is lowered. But we have taken every step to safeguard against inferior goods being passed off under the mark.

(3) L. R. [1901] A. C. 217, 223.
(30) (1838) 4 M. & W. 295.
(31) 30 Ch. D. 454 (1884)
(32) [illegible] Ch. D. 436 (187[illegible]).
(33) 10 Exch. 147 (1854).
(34) [1896] A. C. 7, 17.
(35) [1900] 1 Ch. 551.

Mr. H. D. Bose for the Plaintiff-Respondents in appeals Nos. 65 and 66 of 1913 and in support of the cross-objections by the Plaintiff:—This is not a passing off action nor for infringement but between the licensor and licensee. Even after the assignment to Messrs. Haworth & Co., Messrs. Moran & Co. represented by the Defendants Cresswell, Smyth and Watson are liable under the covenant and for damages for the deterioration of these marks.

[JENKINS, C. J.—Refers to *Major Brothers* v. *Franklin* (2). and says the first point is:—(1) Did anything pass to the Defendants under the contract?

Mr. Bose.—Yes, the four marks together with the right to deal with them passed to the Defendants.

[JENKINS, C. J.—What is your case, are they trade-marks or standardization marks?]

Mr. Bose.—They are trade-marks and they show a certain quality or standard of mark—a combination of both.

[JENKINS, C. J.—The second point is "Did the licensees get anything under the contract?"]

Mr. Bose.—Yes. They got the exclusive right to deal with these marks, which admittedly had a high reputation in the market. Though Cresswell was all along present in Court and could have given material evidence in this case he did not go into witness box.

Mr. Bose refers to Sebastian, pp. 117-118.

A trade-mark may be—

(i) Purely personal.

(ii) Personal indicating that the goods have attained a reputation as being of a certain standard of excellence or of a certain standard merely. In this case it is assignable by a person who is the successor.

(iii) Personal but connected with a

(2) L. R. [1908] 1 K. B. 712.

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manufactory, assignable only with the sale of the manufactory and the business.

With regard to good-will, different elements may be the predominant factor or preponderating essential in different business, *viz.*, (*a*) locality (*b*) trade-name or reputation.

Sebastian, Ch. IX, p. 333.

[JENKINS, C. J.—So far you have not suffered any damages.]

Mr. Bose.—Yes, we have, which is the subject-matter of cross-objections. Mr. Bose refers to sec. 117 of the Indian Evidence Act and says :—So far as the question of royalty is concerned they are bound to pay the same so long as the contract is subsisting and the contract is subsisting as it cannot be said that it is void and opposed to public policy. They cannot deny our title, being our licensees. Sec. 117 of the Indian Evidence Act.

Mr. Langford James then replied to the cross-objections on the question of damages.

C. A. V.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The Plaintiffs, Messrs. Jagannath & Co., are described in the heading of the plaint as a firm carrying on business as jute-balers and shippers and merchants at No. 117, Harrison Road, in the town of Calcutta.

The Defendants are E. C. H. Cresswell, H. A. Smyth, and Geofrey Watson, who carry on business in co-partnership as jute-balers, brokers, and merchants, under the name of Messrs. Moran & Co. at 11, Lall Bazar Street, Calcutta, and G. S. Hannah and C. L. Smallwood, who carry on business in co-partnership as jute-balers, brokers and merchants, under the name of Messrs. W. Haworth & Co. at No. 1, Mission Row. It is alleged in the plaint that the Plaintiff firm has been and is the proprietor of 4 jute trade-marks set forth in the schedule and the Plaintiffs' case is that on the 8th of July 1911 the Defendants Moran & Co., and on the 1st of March 1912 the Defendants Haworth & Co. acquired the right to use and permit the use of these trade-marks and that in return the Defendant firms severally covenanted to maintain the reputation of these marks and to pay an annual fixed royalty of Rs. 10,000 in cash, and Rs. 13,000 in bills. These agreements were repudiated by Haworth & Co. on the 2nd July and by Moran & Co. on the 15th August 1912; and the Plaintiffs, without assenting to these repudiations, have instituted this suit on the 5th September 1912, claiming Rs. 3,50,000 as damages on account of the alleged depreciation of the trade-marks, and Rs. 10,000 in cash, and the execution of three several drafts for the aggregate sum of Rs. 13,500 for and by way of royalty for the jute season 1912-13, or in the alternative Rs. 23,500 as damages.

All the Defendants have resisted the claim, and the suit has been heard by Imam, J., who disallowed the claim for damages for depreciation, but passed a decree for Rs. 23,500 in respect of the claim for royalty.

Against this judgment 3 separate appeals have been filed, one by Haworth & Co., a second by Cresswell and Smyth, and a third by Watson.

The Plaintiffs have on their side taken cross-objections. These several appeals and cross-objections have been heard together and will be determined in one judgment.

All the Appellants advance one common ground of appeal, that the Plaintiffs had no title to the alleged trade-marks, that they passed no interest to the Defendants, and that there is no legal consideration for

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the obligation attributed to them. Watson makes the further point that, having regard to the date of his becoming a partner in Moran & Co.—April 1912, he came under no liability. This plea, however, was expressly limited by counsel before us to the claim for damages, and was not put forward as an answer to the claim for royalty.

We will first trace the title to the alleged trade-marks asserted by the Plaintiffs.

It is said that these marks were originated by Surjoo Coomar Chatterjee, who carried on business, presumably in Calcutta, as a jute-baler until his death in 1893, under the two names of S. C. Chatterjee and M. N. Chatterjee. Apart from subsidiary dealings by way of mortgage and so forth, it is sought to establish the devolution of these marks to the Plaintiffs as follows :—

On the 24th September 1904 Surjoo Coomar Chatterjee's widow purported to assign to Landale and Morgan, a firm of jute-brokers and agents, seven marks, including the 4 in suit, and also the good-will of the business of jute-balers formerly carried on by Surjoo Coomar Chatterjee, the consideration being Rs. 75,000.

On the 26th September 1904 Landale and Morgan in consideration of Rs. 85,000 assigned to Dooli Chand, a baler and dealer in jute, trading under the style or firm of Hursook Das Dooli Chand, these 7 marks and the good-will of the firm of Landale and Morgan "of, into, upon or concerning the said business of jute-balers formerly carried on by the said S. C. Chatterjee, deceased, and thereafter by the firm in succession thereto and the sole and exclusive right to use the said trade-marks or brands mentioned and described in the schedule hereunder written and the name of the said S. C. Chatterjee in connection with the said business and to bale jute-cuttings, jute-rejections and all kinds of jute with and under such marks and brands and name and all the estate, right, title and interest of the firm therein."

On the 8th of May 1907 Dooli Chand purported to assign the trade-marks and the business of Surjoo Coomar Chatterjee to Gocul Chand Khettan for Rs. 3,50,000; and on the 3rd of April 1906 Gocul Chand Khettan purported to make a similar assignment to the Plaintiffs for Rs. 1,90,000.

On the 8th July 1911 the Plaintiffs in their turn executed an exclusive license for the period between the date of the instrument and the 30th June 1914 in favour of Moran & Co. of these 4 trade-marks, and it was thereby agreed that the licensees should and might at all times during the term peaceably and quietly use or employ or permit or authorise others to use or employ, exclusively, the trade-marks, and to hold the good-will of the business of Surjoo Coomar Chatterjee, the original baler, and the marks as far as any of the marks were concerned without any lawful interruption or interference by the proprietors. On the 1st of March 1912 the licensees' rights were assigned to Haworth & Co.

In India the law of trade-marks is not governed by Statute: there is no statutory system of registration, and the rights and liabilities in connection with trade-marks are determined by reference to the principles of the Common Law of England: *British American Tobacco Co., Ld.* v. *Mahboob Buksh* (1).

It is thus established that a trade-mark cannot be assigned or descend in gross; and this rests on no arbitrary rule, but is a necessary consequence of the inherent nature of a trade-mark; for it is a mode of representing the

(1) I. L. R. 38 Cal. 110 (1910).

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origin of the goods to which it is attached, or their trade association, and the truth of the representation is essential.

In its strictest meaning the representation of a trade-mark may perhaps only be true of its originator, but usage has sanctioned a more liberal treatment based on the principle of identification by succession.

And so successors in business have been allowed to use their predecessors' trade-marks where the representation still continues to be substantially true.

Can it, then, be said within the permitted limits of deviation from strict accuracy that the Plaintiffs are entitled to the trade-marks in suit?

It must, we think, be taken that Surjoo Coomar Chatterjee was entitled to those trade-marks and it is no obstacle in the way of that view that the subject of the marks was a natural product, and he was merely their selector, who certified to their good quality : *Major Brothers* v. *Franklin* (2). Nor do we think that it has been shown that the marks were so personal to the originator as to be inalienable.

Surjoo Coomar Chatterjee caried on the business of a baler. He died in September 1893, and the books of the Calcutta Baled Jute Association indicate that his marks continued to be used from the time of his death. This doubtless was with the authority of his successors, but whether there was such a disposition of the good-will of the business, as would be necessary to support this authority, does not appear till 1904.

In that year we have the assignment by the widow in favour of Landale and Morgan to which we have already referred.

This and each succeeding assignment is expressed to be a transfer not only of the trade-marks, but also of the business of jute-balers formerly carried on by Surjoo Coomar Chatterjee. In form, therefore, there has been compliance with the rules that a trade-mark can only be assigned together with the good-will of the business to which it relates.

But is this merely a formal compliance without any reality, a mere device which ought not to be recognised as satisfying the conditions on which a successor is entitled to use a trade-mark he did not originate? For the Appellants it is contended that it is, and in support of this much persistent reliance has been placed on an argumentative but unhappily worded paragraph in the plaint (para. 4).

Any one who attempts to express his meaning in a single sentence 27 lines in length runs the risk of being misunderstood, and the author of this paragraph has not escaped the common fate. It is possible that the paragraph was an attempt to escape from the result of the decision in *British American Tobacco Co., Ld.* v. *Mahboob Buksh* (1) and was composed more in reference to that decision than to the actual terms of the several
ments. But whether that be so or
there is no force in the argument that the actual terms of those
affected by the argumentative
in the plaint.

They in fact purport to transfer the good-will of Surjoo Coomar Chatterjee & Co. "Good-will", Lord Macnaghten has said, "is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start": *Inland Revenue Commissioners* v. *Muller and Co.'s Margarine Ld.* (3). Manifestly that which goes to form the

(2) L. R. [1908] 1 K. B. 712.

(1) I. L. R. 38 Cal. 110 (1910).

(3) L. R. (1901) A. C. 217 at p. 223.

good-will would vary with the nature and conditions of the business. Certainly a transferee would be entitled to use the name in which the business was carried on and to represent himself as carrying on that business. This right passed under the several assignments; for, under their terms, each assignee became legally entitled to exercise these rights, and each assignor lost these advantages.

But then it is said that there is no evidence that any use was made of these rights, or that any assignee carried on the business in the name of Surjoo Coomar Chatterjee and in particular that it is not shewn that Dooli Chand, who had a baling business of his own, kept this assigned business separate.

In dealing with these objections the character of this suit has to be borne in mind and the relations of the parties; it is not brought by one who claims to be the owner of a mark against a stranger for infringement, it is brought against two firms who are at any rate expressed to be licensees and purported to take in that capacity. And a licensee shall not be permitted to deny that his licenser had, at the time when the license commenced, authority to grant such license (Indian Evidence Act, sec. 117).

The authority of the Plaintiffs to grant the license under consideration depends upon whether they acquired a title to the trade-marks, and this they could not acquire in the circumstances of this case without an effective assignment of the business of Surjoo Coomar Chatterjee & Co.

This would seem to preclude the Defendants from questioning the conditions on which the Plaintiffs' authority rested, that is to say, the acquisition by them of the business of S. C. Chatterjee & Co. and the trade-marks. The section is positive in its terms, and we are bound to give full effect to it. Had the Plaintiffs based their case on the licenses, and resisted any attempt to invalidate their title by a reference to its history, they would have been within their rights; and we cannot think that their case has been prejudiced by the mode in which it has been presented.

At any rate section 117 would cast on the Defendants the burden of proving that the good-will of the business had lost its separate existence by merger or otherwise, or had not passed to the Plaintiffs, to support and justify the transfer of the trade-marks, and that the Plaintiffs had not the authority they professed to exercise. This the Defendants had not done.

On the contrary it has been urged for what it was worth that the association of the names M. N. Chatterjee & Co. and S. C. Chatterjee & Co. with the trade-marks itself involved carrying on business in the old name.

Had the Defendants proved their allegation of misrepresentation on the Plaintiffs' part, that would have seriously affected the value of the estoppel on which the Plaintiffs rely.

But no such proof has been given, and not one of the Defendants has gone into the witness-box.

Then it has been contended that the license was in gross and therefore was for an illegal consideration, or at any rate for no consideration, but the agreement purports to vest in the licensees a contractual right to the business. The illegality of the consideration has not been made out, nor can it be said that there was no consideration within the meaning of the Indian Contract Act. From the amounts paid or agreed to be paid at different times, it is obvious that the marks were regarded as possessing considerable commercial value. Nor must it be forgotten that for

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the first year of its term the license was used and paid for and that as a result of the year's working this commercial value of the marks has been seriously depreciated. Though the leasing or assigning of trade-marks without a real transfer of an existing business is a nullity from a legal point of view and in fact deprives them of the characteristics to secure which they are recognised by law, yet we cannot in the circumstances of this case hold that as against the licensees the Plaintiffs have not a good claim to royalty, and we agree with the conclusion at which Imam, J., arrived. We only desire to add that no objection has been urged before us to the form in which the decree in respect of royalty has been passed, and we, therefore, refrain from discussing it. While Imam, J., decreed the payment of royalties, he dismissed the claim for damages, and to this the Plaintiffs have taken a cross-objection. They rely on clauses 4 and 7 of the agreement of the 8th July 1911, and allege that the Defendants, Moran & Co., permitted jute to be packed under the marks which was inferior to the quality of the standard fixed by the London Jute Association for those marks or for the corresponding marks of the same group or otherwise committed breaches of the rules and regulations of the London Jute Association by reason whereof the marks have been removed from the respective groups, (plaint, para. 10).

This claim is now made against Moran & Co. alone, and not against Haworth, whose predicament in the litigation one cannot but feel to be unfortunate.

It is conceded by Moran & Co. that the marks were included in the London Jute Association's groups for 1911, and not in those for 1912; but this, it is argued, is a matter with which these clauses 4 and 7 have no concern. The argument requires an explanation.

In the jute trade, marks have been and are largely employed as an assurance of quality. This has led to the establishment of several groups, and among them the 6 marks group was of especial importance. As the title suggests, there were 6 marks in this group, and each mark was regarded as an assurance that the jute bearing it was up to the standard of a grade called "Firsts" in the trade. Later an eight marks group was established, and this comprised these same 6 marks and two others that had acquired a reputation of merit. It would seem, however, that this 8 marks group, though largely identical with the 6 marks group, was in fact an independent group; and so contracts were made on the basis of one or other of these two groups, or of other groups of marks; for there were many other groups, but with them we have no concern at present.

This then is how matters stood at the commencement of the jute season 1911-12, or in other words on the 1st July 1911.

At this time the London Jute Association had determined to establish its own groups of marks, and without attempting to explore the several reasons by which they had been influenced to this, it may be reasonably surmised that the vicious practice of leasing marks and the results of that practice had in some measure caused the mischief that this new departure was intended to counteract.

It was an easy mode of controlling the marks in use, if only the trade as a whole lent its support. At first apparently this support was somewhat feeble, and contracts on the basis of the Association groups were few; but now they are an important, if not the principal, basis of jute dealings.

This policy evidently had long been

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consideration, but it did not take definite and announced shape until the 1st July 1911, when a circular was issued in the terms appearing in Ex. No. 1 in this

When the London Jute Association thus established groups of their own, they adopted the marks then in use in the trade, and (among others) those of the 6 and 8 marks groups.

There were rules regulating the inclusion or non-inclusion of marks in the Association groups, and some undoubtedly were more stringent than the trade conscience, which had previously regulated, so far as it can be said that there was any regulation, the recognition by the trade or the Association of the marks in use. I may illustrate this by the new rule that 3 penalties might involve the exclusion of a mark, a rule of the Draconian Order, for it operates without reference to the volume of Jute that might be baled under the mark, and disregards the average standard of quality over the whole range of dealings. Three failures in an otherwise excellent course of dealing might involve consequences from which a consistent course of inferior dealing would be exempt.

We point to this in no spirit of criticism; it is not our business or desire to criticise but to emphasize the altered character of Moran's responsibility, if the Plaintiffs' reading of the clauses be accepted.

On the 24th September 1910, when the Association marks had not been established, the Plaintffs and Morans had entered into an agreement substantially the same as that now under consideration and containing provisions identical with the dark clauses, 4 and 7, of the agreement of the 8th July 1911. This shews that at that time there was an apprehension of the risk of non-recognition against which the clauses were directed. But *ex hypothesi* the risk was not of exclusion from the Association's groups, for they did not then exist. The risk must have been the non-recognition by the Association of the marks then in use by the trade—a risk which manifestly was not so urgent as that created by the new rules.

It was against this old risk, Morans contend, and not the new risk created in 1911, that the 4th and 7th clauses were aimed.

The Plaintiffs see in this line of reasoning an attempt to construe a later by an earlier document; but this is hardly a complete statement of the position. It is rather an endeavour to place the Court in possession of the facts which, it may reasonably be said, were within the contemplation of the parties when the agreement of the 8th July was executed, and to shew that there were conditions apart from those created in 1911, to which in the minds of the contracting parties clauses 4 and 7 of that agreement could aptly be applied. This seems legitimate, and it becomes of considerable force when it appears that there is strong reason to believe that these new conditions could not have been known to the contracting parties or have been within their contemplation.

The circular of 1st July 1911 could not have reached Calcutta by the 8th in the ordinary course of mail, nor does it clearly appear that it was otherwise communicated to the parties prior to that date. This is important in considering what were the circumstances, that is, the known circumstances, at the time the agreement was made.

The phraseology of the two clauses too seems to us to aid the view that the risk contemplated and accepted did not extend to exclusion from the Association groups. The two clauses evidently refer

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to the same topic, and they speak of the group of trade-marks which is recognised by the Association, but while the 6 marks group may be said to have been recognised at the date of the agreement, the Association groups were not recognised, but created and established. Mr. H. D. Bose, who has argued the whole case admirably on behalf of the Plaintiffs, points to certain passages in Mr. Macleod's evidence as supporting his contention that the Association has ceased to recognise the 6 marks group, and at one point there would seem to be some verbal justification for the argument. But it seems to turn on the precise force Mr. Macleod placed on the word "recognise," when under enticement of cross-examination he gave an affirmative answer to a question implying that recognition had ceased. The Association then had their own groups, and it would probably be correct to say that they did not recognise any other group as occupying the position it had in relation to them prior to the establishment of the Association group. But Mr. Macleod, we believe, is not so much a grammarian as a man of affairs, and passing from the abstract to the concrete, he declares that the 6 marks group can still be the subject of a contract under the prescribed London forms and further that contracts on the basis of the 6 marks group enjoy the same facilities for arbitration, etc., as are enjoyed by contracts made under the official group. We attach more importance to the position thus disclosed by Mr. Macleod than to the terms of his reply to the question put to him in cross-examination.

Mr. Bose, however, has suggested that the advantage of a more favourable scale of allowances has now been lost, and that the 38 marks are now no better than substitutes. That may be so where the contract is on the basis of the official group; but it had to be admitted that there was nothing to shew this was the case where the contract is on the basis of the 6 marks group, as it still may be if the parties so desire.

It may be that the exclusion of the 38 marks from the Association groups has depreciated the value of those marks in their own group, but as we read the cls. 4 and 7, this casts no responsibility on Morans to indemnify the Plaintiffs.

Morans' contention, therefore, is, we think, well founded and we hold that neither clause refers to exclusion from the Association groups of marks, but only from the group of trade-marks recognised by the Association, as for example the 6-marks group. But apart from the Association groups, it is not alleged, and certainly is not proved, that there has been any omission or demission of the marks in suit, or any removal of them from the 6-marks group; in fact there is every reason to think that they still retain their place. So far we have dealt exclusively with the 6-marks group: but what we have said as to that, applies equally to the other groups for the case and the arguments have proceeded on the basis that what is true of the 6 marks group is, in the circumstances of this case, true of all groups in question other than the Association's groups.

And so we agree with the conclusion shortly and clearly stated by Imam, J., as to the Plaintiffs' inability to recover damages; and in this view it is unnecessary to deal with Watson's separate contention that section 249 of the Indian Contract Act protects him from any liability in connection with this claim for damages.

The result is that each of the several appeals, and also the cross-objections must be dismissed.

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By consent we make the order that each party do bear and pay his own costs of the several appeals and the cross-objections. We say nothing about the paper-books. Costs may, if necessary, be taxed as between attorney and client.

Mr. M. M. Chatterjee, Attorney for the Appellant.

Messrs. Leslie & Hinds and *S. C. Mukerjee*, Attorneys for the Respondents.

CIVIL APPELLATE JURISDICTION

APPEALS FROM APPELLATE DECREES
Nos. 1804 AND 1900 OF 1911,
Nos. 2506, 2532 TO 2582 OF 1911,
Nos. 3394 TO 3426 OF 1911
AND
No 665 OF 1912.

MOOKERJEE, J. BEACHCROFT, J. 1914, Heard, 2 and 3, February. Judgment, 12, February.

KALIKANUND MUKERJEE and ors., Defendants, Appellants, *v.* BIPRODAS PAL CHOUDRY, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 159 161, 167—Limitation Act (IX of 1908), Sch. I, Art. 121—Reg. VIII of 1819, sec. 11, cl. (1)—Putni taluk, sale of, for arrears of rent—Suit by purchaser for recovery of possession of lands within taluk brought within 12 years from date of purchase—Limitation—Applicability of Art. 121—Adverse possession prior to creation of putni, effect of—Cause of action—Adverse possession if arrested by creation of subordinate tenure, when proprietor out of possession—Doctrine of possession following title, application of, where Plaintiff has to prove possession at a particular point of time—Ancient documents showing exercise of right to property, consideration of, as presumptive evidence of possession—Sale under sec. 159, B. T. Act, status of purchaser in—Encumbrance, meaning and annulment of

The Plaintiff who was the purchaser of a putni taluk *at a sale held in 1899 in execution of a rent decree under the Bengal Tenancy Act brought suits against the Defendants within twelve years from the date of his purchase for declaration of his title to the lands held by them within the* putni taluk *and for recovery of possession thereof. There was ample evidence on the record that the adverse possession of the Defendants and their predecessors commenced before the creation of the* putni.

Held—*That the suits were barred by limitation and Art. 121 of the 2nd Schedule of the Limitation Act did not apply to them.*

That the Plaintiff not having established that the possession of the Defendants commenced after the creation of the putni *or that the proprietor of the estate was in possession at the time when the* putni *was granted the interests acquired by the Defendants could not be deemed to be an incumbrance within the meaning of Art. 121 nor was it an encumbrance within the meaning of sec. 11, cl. (1) of Reg. VIII of 1819.*

That the cause of action did not arise on the date on which the Plaintiff purchased the taluk *at the sale held under the Bengal Tenancy Act.*

That the adverse possession contemplated in the decisions NAFFER CHANDRA *v* RAJENDRA LAL (1), WOOMESH CHANDRA GOOPTA *v.* RAJ NARAIN ROY (2), KHANTO MONI DASSI *v.* BIJOY CHANDRA (3) *and* KARIM KHAN *v.* BROJA NATH DAS (4) *is possession which commences after the creation of the* putni *tenure. These cases are founded on the principle laid down in sec. 11 of Reg. VIII of 1819 which is that the purchaser of a* putni taluk *at a sale held under Reg. VIII of 1819 takes the* taluk *in the state*

(1) I. L. R. 25 Cal. 167 (1897).
(2) 10 W. R. 15 (1868).
(3) I. L. R. 19 Cal. 187 (1892).
(4) I. L. R. 22 Cal. 244 (1895).

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in which it was initially created and the judicial decisions above referred to lay down the doctrine that the purchaser takes the property not free merely of all incumbrances that may have accrued upon the tenure by act of the defaulting proprietor, his representatives or assignees, but also free of the interest acquired by an adverse possessor who has been able to acquire such interest by the action of the defaulting proprietor. This doctrine is plainly limited in its application to cases where the adverse possession commenced after the creation of the putni.

That in a case like the present in which the proprietor of the estate is out of possession he cannot merely by the device of the creation of a subordinate taluk *arrest the effect of the adverse possession which has already commenced to run against him and such possession would be effective not only as against the subordinate tenure-holder but also as against the superior proprietor.*

That the Plaintiff before he could succeed must prove that the proprietor was in possession when the putni *was created.*

That the doctrine that possession follows title has no application to a case like the present.

That as laid down by the Judicial Committee in RUNJEET RAM *v.* GOBORDHAN RAM (5), *the Court may in the decision of the question of limitation if there is conflicting evidence on both sides presume that possession was with the party whose title has been established but it does not follow that when the Plaintiff has to establish possession at a particular point of time he is entitled to call upon the Court to presume that because his title has been established possession must be presumed to have been with the holder of the title at the specified period of time. This contention is clearly opposed to the decision of the Judicial Committee in* MOHIMA CHANDRA *v.* MOHESH CHANDRA (6).

That the Plaintiff having made his purchase at a sale held in execution of a rent-decree under the Bengal Tenancy Act under sec. 159 of the Act he made his purchase with powers to annul the interests defined as encumbrance in sec. 161; encumbrance as used in that section includes a statutory title acquired by a trespasser by adverse possession of the land of the defaulting tenure provided such act of possession commenced after the tenure had been created.

That even if he had succeeded in establishing that such adverse possession commenced after the creation of the putni taluk, *before he could succeed, he would have to prove that under sub-sec.* (1) *of sec. 167 he had annulled the encumbrances by service of notice within one year from the date of the sale or the date on which he first had notice of the encumbrance and in the present case the Plaintiff had failed herein.*

Held *(as to the contention that the grant of the* putni *tenure itself was evidence of possession)—That the principle that ancient documents produced from proper custody and by which any right to property purports to have been exercised may rightly be treated as presumptive evidence of possession has no application to the circumstances of the present case.*

These were appeals against the decrees of Mr. S. C. Mallik, District Judge of Zilla Nadia, dated 2nd June 1911, reversing the decrees of Babu Atul Chandra Ghosh, Munsif, Krishnagar, dated the 22nd December 1908.

The facts of the case will appear from the judgment.

Mr. S. P. Sinha and *Babu Jogendra*

(5) 20 W. R. 25 (29) (1873).

(6) L. R. 16 I. A. 23: s. c. I. L. R. 16 Cal. 473 (1888).

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Nath Mukerjee for the Appellants in Nos. 3394 to 3425 of 1911 and No. 665 of 1912.

Babu Harakumar Mitter for Appellants in Nos. 1804 and 1900 of 1911.

Babu Sarat Chandra Khan for Appellants in Nos. 2506, 2532 to 2582 of 1911.

Dr. Rash Behary Ghosh and *Babu Amarendra Nath Bose* for Respondent.

After Counsel for the Appellant read the judgment, the Court called upon the Vakil for the Respondent to argue why the suits would not be barred if the Plaintiff-Respondent could not prove that the zamindar was in possession of the disputed lands before 1807.

Babu Amarendra Nath Bose for the Respondent.—The question formulated is really not one of limitation but a question on the merits.

Viewed as a question of limitation my submission *in the first place* is that the question which was a mixed question of law and fact, not having been raised in any of the Courts below and not having been taken in the grounds of appeal in the High Court should not be taken and tried for the first time in the High Court. *In the second place*, the onus was on the Defendants to prove that their predecessors were in possession before 1807 and that for more than 12 years, which upon the findings of fact arrived at by the lower Appellate Court the Defendants have failed to prove.

Thirdly.—The estate in this case was permanently settled in 1799 with the zamindar. Assuming that the Defendant was in adverse possession of the disputed land, then that adverse possession under the Regulations then in force became available against the zamindar in 1799, and would become complete after 12 years from that date, namely, several years after 1807, and therefore would be an encumbrance upon the *putni*.

(On the next date of hearing.)

Dr. Rash Behary Ghose contended that there was evidence on the record to show that the *putnidar* was in possession of the entire lands of the *mauzas* in suit and relied upon the *putni kabuliyat*, the *thak* map and some oral evidence in the case as also upon the principle that possession follows title.

(On the next date of hearing.)

The Court raised the question that the plaint was defective in that the date of the cause of action was wrongly stated and that the Plaintiff failed to prove that the notice under sec. 167 of the Bengal Tenancy Act was filed within time.

Babu Amarendra Nath Bose.—The point that the plaint was defective was never taken in any of the Courts below, and in any case that cannot be a ground for the dismissal of the suit.

As regards the notice, the case of the Plaintiff was that such notices were served within the time prescribed by law and in some cases the Plaintiff adduced evidence to prove service within that time and in some cases the Court declined to take evidence tendered by the Plaintiff on that point, so that the suits cannot be dismissed without giving the Plaintiff an opportunity to adduce his evidence and in any case without examination of the evidence adduced by the Plaintiff on that point.

The JUDGMENT OF THE COURT was as follows :—

These 88 appeals arise out of as many suits for declaration of title to immoveable property and for recovery of possession thereof. The case for the Plaintiff-Respondent may be briefly stated. He alleges that in 1709 an estate was created from which a *putni* tenure was carved out later on, on some date not known, but the *putni* was sold in 1807, and the purchaser Romesh Chan-

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dra Mukerji on the 26th of June 1804 gave a *kabuliyat* to the zamindar Maharaja Tej Chandra. In execution of a decree for arrears of rent obtained by the proprietor against the *putnidars* the tenure was sold under the provisions of the Bengal Tenancy Act on the 28th November 1899 and passed into the hands of the Plaintiff.

The Plaintiff asserts that the Defendants in the various suits are in possession of different parcels of land within the ambit of the *putni taluk* purchased by him and that they have no right to continue in occupation. He accordingly prays that his title by purchase may be declared and that the Defendants may be ejected as trespassers. According to the Plaintiff the cause of action in each of these suits arose on the 28th November 1899, the date of the auction purchase, and no question of limitation could arise as the suits have been instituted within 12 years from the date of such purchase.

The Defendants resist the claim on the ground amongst others that they hold under rent-free grants and that in any event the claim of the Plaintiff is barred by limitation. Their case in substance is that they have been in possession of these lands from the time of their predecessors and that their possession can be traced back to at least 1790, long before the creation of the *putni* as also the formation of the permanently settled estate out of which the *putni* was carved. The District Judge has found in favour of the Plaintiff that the Defendants have failed to establish their rent-free tenure and that the suits are not barred by limitation inasmuch as they have been commenced within 12 years of the date when the sale became final and conclusive within the meaning of Art. 121 of the Second Schedule to the Indian Limitation Act. On behalf of the Defendants-Appellants the decision of the District Judge has been assailed on the merits and the view taken by him upon the question of limitation has been attacked as obviously unsound. It is not necessary for our present purposes to examine the merits of the cases, because we have arrived at the conclusion that the suits are barred by limitation. The District Judge has held that Art. 121 of the 2nd Schedule of the Indian Limitation Act is applicable to the cases. That article provides that suits to avoid incumbrances in a *putni taluk* sold for arrears of rent must be commenced within 12 years from the date when the sale becomes final and conclusive. We shall for the purposes of the present argument and for that purpose alone assume that Art. 121 applies to a case in which a suit has been instituted by a purchaser of a *putni taluk* at a sale held under the provisions of the Bengal Tenancy Act. The question on this assumption arises, whether the suits before us are suits to avoid incumbrance in a *putni taluk*. The District Judge has held on the authority of the decision in *Naffer Chandra* v. *Rajendra Lal* (1), that Art. 121 is applicable. That decision formulates the proposition that the interest acquired by an adverse possessor of land included in a *putni taluk* is an incumbrance within the meaning of Art. 121 of the 2nd Schedule of the Limitation Act. This view is in accord with the principle recognized in the cases of *Woomesh Chandra Goopta* v. *Raj Narain Roy* (2), *Khanto Moni Dassi* v. *Bijoy Chandra* (3) and *Karim Khan* v. *Broja Nath Das* (4). It is very material to observe however that the adverse possession contemplated in these cases is possession which com-

(1) I. L. R. 25 Cal 167 (1897).
(2) 10 W. R. 15 (1868).
(3) I. L. R. 19 Cal. 787 (1892).
(4) I. L. R. 22 Cal. 244 (1895).

menced after the creation of the *putni* tenure. These cases are founded on the principle laid down in sec. 11 of Reg. VIII of 1819. The first clause of that section declares that any *taluk* or saleable tenure, that may be disposed of at a public sale under the rules of the Regulation for arrears of rent due on account of it, is sold free of all encumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees, unless the right of making such encumbrances shall have been expressly vested in the holder by a stipulation to that effect, in the written engagements under which the said *taluk* may have been held. No transfer by sale, gift or otherwise, no mortgage or other limited assignment is permitted to bar the indefeasible right of the zamindar to hold the tenure of his creation answerable in the state in which he created it for the rent which is in fact his reserve property in the tenure except the transfer or assignment should have been made with a condition to that effect under express authority obtained from such zamindar.

The principle consequently is that the purchaser of a *putni taluk* at a sale held under Reg. VIII of 1819 takes the *taluk* in the state in which it was initially created, and the judicial decisions to which we have already referred lay down the doctrine that the purchaser takes the property not free merely of all incumbrances that may have accrued upon the tenure by act of the defaulting proprietor, his representatives or assignees but also free of the interest acquired by an adverse possessor who has been able to acquire such interest by the action of the defaulting proprietors. This doctrine is plainly limited in its application to cases where the adverse possession commenced after the creation of the *putni*.

In a case in which the proprietor of the estate is out of possession he cannot merely by the device of the creation of a subordinate *taluk* arrest the effect of the adverse possession which has already commenced to run against him and such possession would be effective not only as against the subordinate tenure-holder, but also as against the superior proprietor. Consequently, if the Plaintiff relies upon Art. 121 of the 2nd Schedule of the Indian Limitation Act, he has to establish that the encumbrance which he seeks to annul is due to adverse possession which commenced after the creation of the *putni*. The District Judge has not found that in the cases before us the adverse possession of the Defendants and their predecessors commenced after the creation of the *putni*. On the other hand there is ample evidence that the adverse possession of the Defendants and their predecessors commenced before the creation of the *putni*. There are traces on the record to show that there had been assertions of hostile title before the *putni* itself was created. On behalf of the Plaintiff-Respondent however it has been suggested that there is some evidence of ancient possession of the disputed land by the proprietor of the estate. But before we deal with the evidence to which allusion has been made in the course of argument it may be pointed out that the Plaintiff, before he can succeed, must prove that the proprietor was in possession when the *putni* was created. In order to establish that the proprietor was in possession at that time, it has been argued that we should presume that possession follows title. In our opinion that doctrine has no application to a case of this description. No doubt, it was pointed out by their Lordships of the Judicial Committee in the case of *Runjeet Ram v. Gobor-*

dhan Ram (5) that in the decision of the question of limitation, if there is conflicting evidence on both sides, the Court may presume that possession was with the party whose title has been established. But it does not follow that when the Plaintiff has to establish possession at a particular point of time he is entitled to call upon the Court to presume that because his title has been established, possession must be presumed to have been with the holder of the title at that specific period of time. This contention indeed is clearly opposed to the decision of the Judicial Committee in the case of *Mohima Chandra* v. *Mohesh Chandra* (6) where their Lordships pointed out that it is not enough for the Plaintiff in an action in ejectment to establish his title or his possession at some remote time; but that it is essential for him to prove that he was in possession within 12 years antecedent to the suit. To the same effect are the decisions in *Pudma Coomari Debi* v. *Court of Wards* (7), *Jafar Husain* v. *Mashqu Ali* (8), *Hemanta Kumari* v. *Jagadindra Nath* (9). We have next been asked to hold that the grant of the *putni* tenure itself is evidence of possession; and in support of this argument we have been asked to consider the terms of the *putni kabuliyat*. Our attention has also been invited to the cases of *Attorney-General* v. *Emerson* (10), *Malcomson* v. *O'Dea* (11), *Briston* v. *Cormicon* (12) and *Blandy Jenkins* v. *Dunraven* (13) to show that ancient documents produced from proper custody and by which any right to property purports to have been exercised are admissible even in favour of the grantor or his successors, in proof of possession. This doctrine is justified on the principle that documents of this character may rightly be treated as presumptive evidence of possession, because ancient possession is incapable of direct proof by witnesses and such documents are themselves acts of ownership, real transactions between man and man, intelligible upon the footing of title or at least of a *bonâ fide* belief in title, since in the ordinary course of things men do not execute such documents without acting upon them. This principle plainly has no application to the circumstances of the present cases. An examination of the *putni kabuliyat* does not show that there is any assertion that the grantor of the *putni* at the time was in possession of every parcel of land comprised within the boundaries of the *putni*, nor is there any allegation in the document that the grantee of the taluk obtained actual possession of every piece of land within the tenure granted to him.

It has finally been argued that the *thak* map of 1852 is evidence of possession, and that witnesses have been called to speak to possession of two villages by a lessee from the *putnidar*. The evidence however is of the vaguest description and does not show that the *putnidar* who was the owner of the estate was in actual possession of any particular parcel of land now in dispute. In these circumstances we are of opinion that the Plaintiff has not established that the possession of the Defendants commenced after the creation of the *putni* or that the proprietor of the estate was in possession at the time when the *putni* was granted. Consequently the interest acquired by the Defendants cannot be deemed to be an incumbrance within the

(5) 20 W. R. 25 (29) (1873).
(6) L. R. 16 I. A. 23 : s. c. I. L. R. 16 Cal. 473 (1889).
(7) L. R. 8 I. A. 229 (1881).
(8) I. L. R. 14 All. 193 (1892).
(9) 10 C. W. N. 630 (1906).
(10) [1891] App. Cas. 649, 658.
(11) 10 H. L. C. 593 (1863).
(12) 8 App. Cas. 641 at p. 666 (1878).
(13) [1899] 2 Ch. 121.

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meaning of Art. 121 nor it is an encumbrance within the meaning of the first clause of sec. 11 of Reg. VIII of 1819. In this view the decrees made by the District Judge cannot be supported.

It is clear however that the case as made in the plaint is based on an entirely erroneous assumption. The Plaintiff has come into Court on the allegation that his cause of action arose on the 20th November 1899 when he purchased the property at a sale held under the provisions of the Bengal Tenancy Act. This statement was material for the purposes of the case, because under sec. 50, cl. (*d*), of the Civil Procedure Code of 1882, it was incumbent on the Plaintiff to embody in his plaint a plain and concise statement of the circumstances constituting the cause of action and where and when it arose. It was further his duty, if the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, to show in his plaint the ground upon which exemption from such law was claimed. In the cases before us the Defendants have been unquestionably in possession for more than 12 years antecedent to the suit. The Plaintiff therefore had to make out an affirmative case to take his suit out of the statute of limitation, and he based his case on the ground that the cause of action arose on the 28th November 1899 on the assumption that Art. 121 of the Second Schedule of the Indian Limitation Act was applicable.

But it cannot be disputed that the cause of action did not arise on the 28th November 1899. The Plaintiff made his purchase at a sale held in execution of a rent decree under the Bengal Tenancy Act. Under sec. 159 of Bengal Tenancy Act, he made his purchase with power to annul the interests defined as incumbrances in sec. 161. Clause (*a*) of that section lays down that the term encumbrance used with reference to a tenancy means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in sec. 160. With reference to the use of the term encumbrance in this section, it was held in the cases of *Gocool Bagdi* v. *Debendra Nath Sen* (14) and *Arsadulla* v. *Mansubali* (15) that encumbrance includes a statutory title acquired by a trespasser by adverse possession of the land of the defaulting tenure, provided such act of possession commenced after the tenure had been created. It was further held that such encumbrance cannot be annulled in any manner other than that provided in sec. 167 of the Bengal Tenancy Act. Consequently upon the facts of the case it is clear that before the Plaintiff can succeed he must establish that the interest acquired by the Defendants by adverse possession constitute an encumbrance within the meaning of sec. 161 of the Bengal Tenancy Act and are capable of annulment in the manner provided in sec. 167. The difficulty of the Plaintiff, if this view of the matter be adopted, is that he has not established that the adverse possession of the Defendants and their predecessors commenced after the creation of the *putni taluk*. But even if he had succeeded in establishing that such adverse possession commenced after the creation of the *putni taluk*, before he could succeed, he would have to prove that under sub-sec. (1) of sec. 167, he had annulled the encumbrances by service of notice within one year from the date of the sale or the date on which he first had notice of the encumbrances. In the plaint it was stated

(14) 14 C. L. J. 156 (1911).
(15) 16 C. L. J. 539 (1912).

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that notices had been served as contemplated by sub-sec. (1) of sec. 167 on the 5th October 1907. But the Plaintiff asserted that such service of notice was unnecessary and the Courts below did not investigate whether the notices were actually served; and if served, whether they were served within one year from the date on which the Plaintiff first had notice of the encumbrances. It is not disputed that the notices, which are alleged to have been served on the 5th of October 1907, were not served, if served at all, within one year from the date of the sale, which took place as already stated on the 28th November 1899. If therefore the interest of the Defendants constituted an encumbrance the Plaintiff would have to establish that he had notice of the encumbrance within one year prior to the 5th October 1907. The Courts below have not found that the Plaintiff had first notice of the interest of the Defendants within one year prior to the 5th October 1907. On the other hand it is extremely improbable, to say the least, that when so many persons in so many suits were in open and peaceable occupation of so many parcels of land that the Plaintiff should not have discovered till after 5th of October 1906, that is, nearly seven years after he had purchased the *putni* at the execution sale, that the Defendants claimed to hold under an adverse title. The slightest enquiry, such as a prudent owner would in ordinary course have made, would have disclosed that the occupants of the land claimed to hold them without payment of rent to the proprietor or his representatives. Consequently if the provisions of the Bengal Tenancy Act are applied, as they must be applied, the position of the Plaintiff becomes even more difficult than it is, if reliance is placed only upon Art. 121 of the Second Schedule to Indian Limitation Act on the groundless assumption that the sale took place under the provisions of the Putni Regulation. We may add that the restriction mentioned in sec. 195 (*c*) of the Bengal Tenancy Act does not touch the question of the applicability of sec. 167 to the lands in suit.

The result is that these appeals must be allowed, the decree of the District Judge set aside and the suits dismissed with costs in all the Courts.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 1206 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
13, January.

CHARU CHANDRA GHOSH, Petitioner,
v.
CHANDI CHARAN RAY CHOWDHURY, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 21, r. 90—Application to set aside sale dismissed for default—Application for restoration, dismissal of—Appeal—Sec. 141—Or. 43, r 1 (e)—Sufficient cause for restoration.

An application to set aside a sale under r. 90 of Or. 21 of the Civil Procedure Code having been dismissed for default, the applicant applied for restoration of the case, but this application was refused:

Held—*That no appeal lay against the order refusing to restore the case.*

Cl. (e) to r. 1 of Or. 43 of the Code did not apply to this order.

Sec. 141 of the Code which replaces sec. 647 of Act XIV of 1882 has not effected any alteration in the law.

On the date fixed for hearing of Appellant's application to set aside a sale, the Appellant came to Court and finding the Judge engaged in the trial of another suit, left the Court and went on another business leaving no instructions to his pleader. Returning later, he found that

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his case had been called on in the meanwhile and dismissed for non-prosecution.

Held—*That there were no grounds for restoring the case.*

MANILAL DHUNJI *v.* GULAM HOSAIN (9) *and* ISMAIL IBRAHIM *v.* JAN MAHMED (10), *relied on.*

SOMAYYA *v.* SUBBAMA (11) *and* LALTA PRASAD *v.* RAM KARAN (12), *not followed.*

This was a Rule granted on the 22nd August 1913, against an order of H. P. Duval, Esq., District Judge of Zilla 24-Parganas, dated the 30th June 1913, confirming an order of Babu Purna Chandra Bose, Munsif, Alipur, dated the 29th April 1913.

The facts of the case will sufficiently appear from the judgment.

Babu Satish Chandra Mukerjee for the Petitioner.

Babu Biraj Mohan Majumdar for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

We are invited in this Rule either to set aside an order by which the Court of first instance refused to restore an application for reversal of an execution sale or to direct the lower Appellate Court to entertain an appeal against that order. The Petitioner had applied to the Court of first instance under r. 90 of Or. 21 of the Code of Civil Procedure of 1908 for reversal of an execution sale. The case had been set down for disposal on the 23rd November 1912. On that day, he was present in Court and found the Judge engaged in the trial of another suit. He left the Court and went on another business. He returned after an hour and found that his case had been meanwhile called on and had been dismissed for non-prosecution, as his pleader had informed the Court that he had received no instructions. He therefore applied to have this order of dismissal set aside. The Court held on the 29th April 1913 that no sufficient cause for non-appearance within the meaning of r. 9 of Or. 9 of the Code had been established and refused to restore the application. The Petitioner then appealed to the District Judge. When the appeal was taken up for disposal, a preliminary objection was taken that the appeal was incompetent. The District Judge gave effect to this contention and rejected the appeal. We are now invited either to set aside the order of the Court of first instance or to direct the lower Appellate Court to entertain the appeal.

The first question for consideration is whether the appeal preferred to the District Judge was competent. It has been argued that the order of dismissal was made under r. 8 of Or. 9 of the Code, that the application for restoration was made under r. 9 of Or. 9 and that consequently under Or. 13, r. 1, cl. (*e*) an appeal lay to the District Judge. In our opinion there is no foundation for the contention. Cl. (*c*) of r. 1 of Or. 43 provides that an appeal shall lie from an order under r. 9 of Or. 9 rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit. Here the Petitioner did not prefer an appeal against an order refusing to set aside the dismissal of a suit. What had been dismissed was his application under r. 90 of Or. 21 for reversal of a sale. The language of cl. (*c*) of r. 1 of Or. 43 is identical with that of cl. 8 of sec. 588 of the Code of 1882. Under that Code, it had been held by this Court in the cases of *Sujauddin* v. *Reazuddin* (1) and *Jung*

(9) I. L. R. 13 Bom. 12 (1888).
(10) 10 Bom. L. R. 904 (1908).
(11) I. L. R. 26 Mad. 599 (1903).
(12) I. L. R. 34 All. 426 (1912).

(1) I. L. R. 27 Cal. 414 (1899).

Bahadur v. *Mohadeo Pershad* (2) that no appeal lay against an order rejecting an application under sec. 102 for revival of an application under sec. 311 which had been dismissed for non-appearance of the judgment-debtor. The same view had been previously taken in the cases of *Ningappa* v. *Gangawa* (3) and *Raja* v. *Srinivasa* (4) and has subsequently been adopted by the Allahabad High Court in the case of *Ghasiti Bibi* v. *Abdul Samad* (5). We are of opinion that the new Code has not, in this respect, effected any alteration in the law. It has been argued, however, in support of the contrary view that a substantial alteration has been effected in sec. 647 of the Code of 1882, which has been replaced by sec. 141 of the Code of 1908. There is clearly no foundation for this contention. Sec. 647 provided that the procedure therein prescribed should be followed, as far as it could be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals. To this section was added an explanation in 1892, to the effect that the section does not apply to applications for execution of decrees, which are proceedings in suits. In sec. 141 of the Code of 1908, sec. 647 is reproduced in the following form :—"The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction. The two alterations effected are, first, that the words "other than suits and appeals" are omitted, secondly, the explanation is omitted. This, however, has not effected any alteration in the law as is clear from the history of the legislation on the subject, as indicated by the decisions in the cases of *Thakur Prashad* v. *Fakirulla* (6), *Asim Mondal* v. *Raj Mohan* (7) and *Hari Charan* v. *Manmatha Nath* (8). In our opinion, it is clear that the appeal preferred to the District Judge was not competent and was rightly rejected.

We have next to deal with the contention that the order of the Court of first instance was erroneous on the merits and should be set aside by this Court in the exercise of its revisional jurisdiction. The Court of first instance accepted the principle laid down in the case of *Manilal Dhunji* v. *Gulam Hosain* (9), which was subsequently followed in the case of *Ismail Ibrahim* v. *Jan Mahmed* (10). In this case it was laid down that where a party has not been taken unawares and where he was under no compulsion to leave the Court, nor could assign any weighty cause for his absence, he took the risk of the case being called on in his absence and could not be said to have established sufficient cause for his absence within the meaning of the Code. Reliance, however, has been placed upon the cases of *Somayya* v. *Subbama* (11) and *Lalta Prasad* v. *Ram Karan* (12), in which an attempt was made to draw a distinction between "sufficient cause" and "valid reason" for non-appearance. We are not impressed by the distinction suggested. In any event, upon the facts of the case before us, it is manifest that the Petitioner is not entitled to any consideration from the Court. He was present in Court. He left the Court of his own accord to attend to other business, and he assumed that his own case would not be

(2) I. L. R. 31 Cal. 207 (1903).
(3) I. L. R. 10 Bom. 433 (1885).
(4) I. L. R. 11 Mad. 319 (1888).
(5) I. L. R. 29 All. 596 (1907).
(6) L. R. 22 I. A. 44 : s. c I. L. R. 17 All 106 (1894).
(7) 13 C. L. J. 532 (1910).
(8) I. L. R. 41 Cal. 1 (1913).
(9) I. L. R. 13 Bom. 12 (1888).
(10) 10 Bom. L. R. 904 (1908).
(11) I. L. R. 26 Mad. 599 (1903).
(12) I. L. R. 34 All. 426 (1912).

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taken up during his absence. He did not even take the precaution to instruct his pleader. The result was that when the case was called on during his absence, the pleader intimated to the Court that he had no instruction to proceed with the matter. A party who deliberately chooses to act in this way must take the consequence of his own conduct.

The result is that the Rule is discharged with costs. We assess the hearing fee at three gold mohurs.

Rule discharged.

[CRIMINAL APPELLATE JURISDICTION.]

APPS. NOS. 439 AND 440 OF 1914.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1914,
4, August.

RAM RANJAN RAY
v.
KING-EMPEROR.

Indian Penal Code (Act XLV of 1860), secs 114, 302—Abetment—Sec. 114 if applies when abettor present—Duty of prosecution to call all available eye-witnesses—Purpose of criminal trial—Duty of Public Prosecutor.

One R was charged with having committed murder of one B by being present and abetting one M in striking and thereby killing him. The allegation was that R gave orders to M to strike B who was thereupon hit on the head with a lathi. *R was convicted under sec. 302, read with sec. 114, I. P. C. In the course of the trial, two persons who were admittedly eye-witnesses to the occurrence were not called as witnesses by the prosecution either in the Committing Magistrate's or the Sessions Court.*

Held—*That the conviction of R for murder under sec. 302/114, I. P. C., could not stand for the simple reason that the only abetment charged necessarily required the presence of R while to come within sec. 114 the abetment must be complete apart from the presence of the abettor.*

That the purpose of a criminal trial is not to support, at all costs, a theory, but to investigate the offence and to determine the guilt or innocence of the accused and the duty of a Public Prosecutor is to represent not the Police but the Crown and this duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else.

That it was undoubtedly the duty of the Public Prosecutor in a capital case to have placed before the Trial Court the testimony of all available eye-witnesses.

REG. *v.* HOLDEN (2) *referred to.*

Mistake in the report In re DHUNNO KAZI (1) *pointed out.*

This was an appeal preferred on the 5th June 1914 against the conviction under sec. 302/114 and sentence of transportation for life passed by C. Tindall, Esq., Sessions Judge of Bankura, on the 28th May 1914.

The facts of the case material to this report will appear from the judgment.

Mr. Norton and *Mr. Bagram* and *Babus Manmotha Nath Mukherjee, Probodh Chandra Chatterjee* and *Mritunjoy Chatterjee* for the accused in No. 439.

Mr. Bagram and *Babus Probodh Chandra Chatterjee* and *Mritunjoy Chatterjee* for the accused in No. 440.

Mr. Donogh and *Babu Monindra Nath Banerjee* for the Crown in both appeals.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—Ram Ranjan Ray, a zamindar in the Bankura District, Umesh Chandra Mookerjee, one of his *gomastas*, and Madhub Mistri, his Up-country peon,

(1) I. L. R. 8 Cal. 121 at p. 124 (1881).
(2) 8 C. & P. 606, 609 (1838).

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have been charged with offences which resulted in the death of Dhan Kristo Laik and his nephew Bunwari Laik, tenants of Ram Ranjan. The charges against Ram Ranjan were that he on or about the 18th of March 1914 at Dejuri committed murder of Dhan Kristo Laik by striking him with a *lathi* and thereby killing him, and also that he committed murder of Bunwari Laik by being present and abetting Madhub Mistri in striking and thereby killing him. Umesh Chandra Mookerjee was also charged with the murder of Bunwari by being present and abetting Madhub. The charge against Madhub Mistri was that he murdered Bunwari, and that he caused simple hurt to Hari Laik.

Umesh has been acquitted. Ram Ranjan has been acquitted of the murder of Dhan Kristo, but convicted of the murder of Bunwari by being present and abetting Madhub Mistri, and Madhub Mistri has been convicted of both the offences with which he was charged.

The sentence in each case has been transportation for life. Ram Ranjan and Madhub have appealed but no appeal has been preferred by the direction of the Local Government.

We therefore have to assume that Ram Ranjan was not guilty of the murder of Dhan Kristo or of any offence against him of a lesser degree.

I will here state the broad features of the case for the prosecution, largely borrowing for that purpose from the first information as contained in Ex. I.

Ram Ranjan on the 6th of March came to his village of Dejuri and put up at the Durga Mela. He was anxious to secure his tenants' assent to an enhancement of their rents, and sent for some of them with a view to discussing the matter. The zamindar's demands were resisted, and ultimately on the 8th of March he summoned Bunwari through Madhub Mistri to whom I will in future refer as the *nagdi*.

Bunwari was taken to the Durga Mela and detained there. What followed is thus described in the first information. As he (that is, Ram Ranjan) was having him (that is, Bunwari) assaulted by the aforesaid *nagdi* for his not agreeing to pay rent at an enhanced rate, Dhan Kristo Laik went to Ram Ranjan Baboo and said "yesterday you brought away a he-goat and have kept it tied, and to-day why are you having my nephew assaulted by the *nagdi*?" On this Ram Ranjan Baboo and Umesh Mookerjee gave orders to the Upcountry *nagdi* saying *mar salako*, whereupon *nagdi* wounded Bunwari Laik by kicking him first and then striking him with a *lathi* on the head. Ram Ranjan baboo has caused grievous hurt to my uncle Dhan Kristo Laik by striking him on the head with the *lathi* which was in his hand. The wounds on Bunwari Laik and Dhan Kristo Laik are serious. There is no hope of their lives."

Besides the Appellants and Dhan Kristo and Bunwari, there were in the Durga Mela at this time Umesh Chandra Mookerjee, Gosto Chatterjee and Ramanath Roy, all *gomastas* of the zamindar.

Even on the case for the prosecution the conviction of Ram Ranjan for murder under sec. 302 of the Indian Penal Code, read with sec. 114, cannot stand for the simple reason that the only abetment charged necessarily required the presence of Ram Ranjan, while to come within sec. 114 the abetment must be complete apart from the presence of the abettor. This was recognised by Mr. Donogh who has appeared on behalf of the Crown and he conceded that all he could ask for was a conviction of abetment of murder under sec. 109.

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We must therefore see whether the evidence would justify a conviction of Ram Ranjan under that section.

At the outset we are confronted with a serious difficulty by reason of the way in which this case was conducted before the Sessions Court. Gosto Chatterjee and Ramanath Roy were admittedly eye-witnesses of the occurrence and yet the Public Prosecutor did not call them as witnesses, notwithstanding repeated requests by Mr. Norton.

The Public Prosecutor cannot shelter himself behind the suggestion that he was able to form an opinion from evidence previously given that these men would not be truthful witnesses; for they were not even examined before the Committing Magistrate.

Mr. Donogh contended that the prosecution even in a case of murder was only bound to call witnesses "in their favour," and for this he relied on a remark attributed to Sir Arthur Wilson in the report of *In re Dhunno Kazi* (1). But this remark appeared to me so opposed to the established rule and also to the whole trend of the judgment that I examined the original record and there found that the words used by the learned Judge was not "favour" but "power" and this is how the judgment is reported in 10 C. L. R. 151. Obviously therefore Sir Arthur Wilson's authority cannot be invoked in favour of the prosecution's contention, and if, as we have been told, the conduct of the Public Prosecutor is in accordance with the general mofussil practice, the sooner that practice is stopped the better. The practice, if it exists, rests on a fundamental misconception of the purpose of a criminal trial and the duty of a Public Prosecutor.

That purpose is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the Police, but the Crown, and this duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else.

It was therefore undoubtedly the duty of the Public Prosecutor in a capital case like the present to have placed before the Trial Court the testimony of all available eyewitnesses. This duty is clearly illustrated by the case of *Reg.* v. *Holden* (2) where in a murder trial counsel for the prosecution did not propose to call an eyewitness because she was brought to Court by the defence. On that the presiding Judge remarked, "She ought to be called. She was present at the transaction. Every witness who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should have their evidence so as to draw their own conclusion as to the real truth of the matter." This is no technical rule: it is founded on common sense and is dictated by humanity.

The omission of the Public Prosecutor has involved this case as it comes before us in what Mr. Donogh on behalf of the Crown has very justly described as mystery. Indeed he felt this mystery to be so embarrassing that he asked for a re-trial or at any rate for an examination of the witnesses that had not been called. But having regard to the time already occupied by the case and the expenditure incurred this was opposed and reasonably opposed by the defence, and we must therefore

(1) I. L. R. 8 Cal. 121 at p. 124 (1881).

(2) 8 C. & P. 606, 609 (1838).

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dispose of the case on the record as it stands.

The sequence of events as described by the prosecution is improbable and unnatural and hardly accords with the connected actions of responsible human beings. There is obviously something kept back, something omitted which is required to link up the narrative, and to present a reasonable and connected picture of what occurred.

The papers before us however disclose the description by Gosto and Ramanath shortly after the event, and it is a description that acquires some value from its correspondence with the story told by Ram Ranjan in his first information, and the statement made by tho *nagdi* to the Magistrate on the 9th. Correspondence of this class may be attributed to concoction but in estimating the probability of this it has to be borne in mind that Gosto and Ramanath did not escape with Ram Ranjan but were kept prisoners by the villagers and that even when Ram Ranjan and Umesh were brought to Dejuri where Gosto and Ramanath were, they were throughout kept first under police observation and then under arrest.

There was therefore no opportunity of concoction except in the presence and with the knowledge of the police, and the evidence discloses no such concoction. Nor is the opportunity of concoction in the case of the *nagdi* obvious if regard be had to the statements of the Goalas, who were also kept back, and, in my opinion, wrongly kept back by the prosecution. The importance of the story thus told by the defence is that it unmistakably points to an angry irruption of the villagers into the Durga Mela.

If this be true, the whole story takes a natural shape, and the improbabilities are smoothed out. Nor is there any unlikelihood in this story : on the contrary the record, with all its imperfections, discloses much that points in the direction of its truth, and supports the idea of an irruption and consequent scuffle and exchange of blows. Thus one of the prosecution witnesses says there were villagers outside the Durga Mela before the occurrence. When the place was searched a *lathi* was found, and there is no suggestion that it belonged to the accused's party : there were indications of disturbance in the Durga Mela : there were injuries on the *nagdi* which both assessors think, and in my opinion rightly, were genuine and these injuries are suggestive of an attack on him with a *lathi*.

These matters may not alone amount to proof of an irruption and scuffle but they certainly encourage the idea that the whole story has not been placed before us, and justify the application here of the view expressed by Sir Arthur Wilson in *Dhunno Kazi's* case (1) that where witnesses are not called without sufficient reason being shown the Court may properly draw an inference adverse to the prosecution.

I certainly infer that the prosecution has not placed before us a complete picture of what occurred, but has withheld that which would have been favourable to the accused. I do not suggest that the prosecution story is wholly false : far from it.

Thus I am convinced that it was a blow delivered by the *nagdi* that caused Bunwari's death, but I am far from satisfied that the prosecution have placed before us the circumstances that immediately led up to this fatal blow.

It may be that Dhan Kristo addressed the zamindar in terms which were regarded as impertinent, and that this village magnate called out *maro salako*

(1) I. L. R. 8 Cal. 121 at p 124 (1881).

RAM RANJAN RAY v. KING-EMPEROR.

or some such offensive and provocative expression. But I cannot for a moment suppose that he meant thereby to instigate the murder of his tenant, nor can I believe that the *nagdi* to whom it was addressed so understood it. A cuff, a blow, or a kick was all that can have been intended, and curiously enough in the first information of the villagers it is said that after the zamindar so called out, the *nagdi* kicked Bunwari first and not until after this struck him with the *lathi*. It is true that the villager who gave this information showed an anxiety to correct it when he came to give evidence. I wholly distrust this correction; it is unlikely that the head constable would write down an expression of that kind if it was not said to him, and though his statement was read to him at the time, the villager did not then perceive the error upon which he promptly fastened in the witness-box without any apparent aid.

It is possible that more astute minds than his realised that those words might help to save Ram Ranjan and Umesh from the gallows, and that they should be explained away. It is intelligible that the villagers, already exasperated by the high-handed action of the zamindar, went to their companion's aid when they heard the zamindar's order and saw the kick. If there was an irruption of villagers this would be the probable sequence of events, and the treatment of the case by the Public Prosecutor has made it impossible for us to hold with the assurance requisite on a capital charge that this did not occur.

I wish to say nothing in palliation of the zamindar's conduct or of his exclamation, if in truth it was uttered by him, but I am unable on the record as it stands to hold him guilty of instigating Bunwari's murder or even the *lathi* blow which caused Bunwari's death.

Even if it be assumed that Ram Ranjan uttered the exclamation attributed to him the only natural consequence of that was the kick described in the first information. That might have amounted to an offence but no charge has been made in respect of it. In the circumstances therefore we have no option but to acquit Ram Ranjan, but it may be hoped that his experience of the 8th of March will teach him the danger of having in his train a man armed with a deadly weapon when he is dealing with his tenants: for though he is not proved to be legally responsible for the crime, I can hardly suppose him to be so callous as to contemplate without some remorse his association with the killing of two of his villagers. The *nagdi* is proved to have inflicted the blow of which Bunwari died, but I do not think the case justifies a conviction under sec. 302. At the same time the defence has not been able to establish a plea of private defence justifying what he did. We therefore convict him under sec. 304 and pass on him a sentence of 7 years' rigorous imprisonment. The appeal in respect of the offence on Hari fails, but the sentences will run concurrently.

Mr. Norton has told us of the fairness with which the Sessions Judge placed materials at his disposal for the purpose of the defence. This is as it should be, and I am further gratified with the treatment by the learned Judge of the Assessors as disclosed by the record, and his careful and conscientious use of their experience. It is much to be commended and presents a pleasing contrast with the treatment of Assessors which has sometimes come under my notice in other cases.

THE

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Contents.

NOTES.

Sir Tarak Nath Palit.

The death of Sir Tarak Nath Palit has created in the ranks of the Bar and also amongst the leading men of India a gap which will not soon be filled. We published a notice of his public career at the time he was knighted. By his rare talent and force of character he attained a degree of success at the Bar and made for himself a position which was unique amongst his contemporaries. Many have made money at the Bar or in business, but few have had the heart to leave everything at the end for the service of those from whom it was taken. No charity is more welcome than that given for the culture and education of youths or the alleviation of the sufferings of the afflicted. Sir Taraknath like most men of keen intellect and rare independence was apt to be mistaken on superficial acquaintance as being devoid of sentiment. But within his rough exterior he had a truly kind heart and was always willing to help a good cause and deserving individuals. He never took any active part in any public movements, but every movement which was for the good of the community had his most practical sympathy and support. At the Bar he was respected as much for his singular ability as for his rare indpendence.

Neutrality of the Suez Canal.

Rumours have been rife about the blocking of the Suez Canal and of the possibility of its being included in the arena of hostilities in the course of the present war. But under the Convention of Constantinople which was signed by all the European Powers in October 1888, all the European Powers, belligerent or otherwise, are debarred from violating the neutrality of the canal secured by the Convention. Should Turkey attempt to violate its neutrality, Holland, Italy and Spain may be required to join the Allies against Turkey, Austro-Hungary and Germany. It is for this reason, we suppose, that Turkey is not anxious to violate the neutrality of the Suez Canal.

The more important of the provisions of the Convention are :—That the canal is to be open to merchantmen and men-of-war of all nations in times both of peace and war. The entrances to the canal can never be blockaded. None of the belligerents are entitled to embark or disembark troops or munitions of war within the canal or within a three-mile limit of any of its ports. Men-of-war of the belligerents or prizes taken by them cannot stay in the canal for more than 24 hours except under stress of necessity. They have ordinarily to pass through the canal without delay. But they cannot be followed by other belligerents except after an interval of 24 hours. Although in time of peace the Powers who are signatories to the Convention are allowed each of them to station two men-of-war in the harbours of Port Said and Suez, at the time of war no belligerent is allowed to do so.

In time of war, even if Turkey be a belligerent, no act of hostility can be committed by her and much less by any other belligerents either inside the canal or within the three-mile limit of any of its ports. No permanent fortifications are allowed to be erected on the canal. The duty of securing the strict observance of these rules is assigned to Egypt or in other words to Great Britain. It necessarily follows

that Great Britain acting on behalf of the Egyptian Government is legitimately within her rights to protect the inviolability of the Suez Canal by posting armed troops and erecting temporary fortifications. She and her allies are also justified in calling upon Italy, Spain and Holland to help them in protecting the neutrality of the Suez Canal. The Allied Powers are also within their rights in taking steps for preventing any of the belligerents from blocking the canal by ships or otherwise.

CONVEYANCE BY DECREE OF COURT AND AWARD OF ARBITRATOR.

It is well known that a Court can by consent of parties or as a matter of compromise pass decrees declaring a charge on a property by way of mortgage or otherwise and also direct transfer of properties which are as effective as any conveyance. But with regard to arbitration awards, the following questions may be asked:

(1) Can sales and mortgages of immoveable properties be legally effected in the form of an award by the arbitrators with or without the intervention of the Court?

(2) Can such awards be made without the consent of the parties, when there is no specific mention in the submission paper about the transfer of immoveable properties?

(3) If so, how far do the said awards over-ride the provisions of the Transfer of Property Act, secs. 54 and 58, and the provisions of the Stamp and Registration Acts?

We shall try to answer the above questions by reference to decided cases

In JOTI KURVETAPPA v. SIRASAPPA, 16 M. L. J 354; 30 Mad. 478, the facts of the case were:—The Plaintiff prayed for a money-decree in the plaint The parties entered into a compromise whereby the Defendants agreed to pay a certain amount to the Plaintiff in eleven equal instalments, and the amount was made a charge on certain immoveable property of the Defendant with interest at 12 per cent. in default of regular payment. The Court passed a decree in terms of the compromise. Held, there was nothing to restrict the Court from making the amount a charge on the immoveable properties of the Defendants, even though the plaint only prayed for a money decree From this case it appears that the contrary principle enunciated in 18 Mad. 111 and 22 Mad. 214 is no longer good law.

In SUBBARAYUDU v. VENKATARATNAM, 17 M L. J 200, the High Court has held that there is nothing in law to prevent, and nothing opposed to policy in parties to a suit entering into a compromise whereby the Defendants agree to a mortgage decree being passed against them even in respect of the portion of the claim not secured by the mortgage.

In RAMASWAMI KAVUNDAN v. PRESA MAISTRY, 17 M. L. J. 37, the parties in the case entered into an agreement whereby Plaintiff and his younger brother were to execute a sale-deed within a week conveying the suit-lands to Defendant for a certain sum and in default the suit was to be dismissed. Held that it was competent to the parties to enter into such an agreement and to the Court to give effect to it on proof of default.

In ANANTHA NARAYAN AIYAR v. ABDUL KARIM, 17 M. L. J. 255; 2 M. L. T. 349; 30 Mad. 421, a suit brought only for rent was compromised for a decree which declared the Defendant entitled to hold the property for eleven years more and for ejectment through Court if more than 1 year's rent be in arrear. Held that the mere fact that a compromise decree provided for reliefs which the Plaintiff could not have obtained in the suit, if it had been tried out, affords no ground for questioning the decree in execution. In this case the Rulings in 9 All. 229, 16 M. L. J. 354, 5 C. W. N. 485, 18 Mad. 110, 22 Mad. 214, were distinguished.

In TASIMUDDIN BISWAS v. BHUBAN JELINI, 34 Cal. 456, the Court has held that, if a compromise and the decree in terms of it go beyond the subject-matter of the suit, the decree no doubt would not be executable. But yet the compromise would be evidence of an agreement binding upon the parties even though not registered. This case has been referred to in 7 C. L. J. 492; 35 Cal. 837; 12 C. W. N. 849.

In PURNA CHANDRA SARKAR v. NIL MADHUB NANDI, 5 C. W. N. 485, the Court has ruled that a decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the suit and contains other conditions. The other conditions, if they are the considerations for the compromise of the subject-matter of the suit, must be incorporated in the decree; but if the other conditions are independent of it, they may be regarded as surplusage. This case was referred to in 1 C. L. J 388, 17 M. L. J. 255, 30 Mad. 421 and was followed in 7 C. L. J. 492; 35 Cal. 837; 12 C. W. N. 819.

From these cases it clearly follows that with the consent of the parties an award with or without the intervention of the Court can give relief extraneous to the subject-matter of reference. There is nothing in principle or in Order 23, rule 3 of the Civil Procedure Code of 1908, compelling a Court to restrict the relief to be granted in accordance with a compromise to what is prayed for in the plaint or less.

This view receives support from the ruling in RAGHAVENDRA v. GURURAO, 15 Bom. L. R. p. 362, where it is said that the policy of the law is to uphold the private settlements and make them legally effective, if there be (a) a reference, (b) something to arbitrate on, and (c) an award thereon. The policy of the law dictates that an award should be accorded effectiveness without minute inquiry by the Court. The ruling goes to the length of holding that a matter beyond the pale of Civil Courts under sec. 9 of the Criminal Procedure Code can be incorporated into an award which cannot invite any objection for its filing under sec. 20, Sch. II.

When there is no consent of the parties, the arbitrators cannot go beyond the four corners of reference; much less can they effect a charge on

property or create any interest by way of mortgage or sale in immoveable property. Absence of consent of parties negatives jurisdiction in the arbitrators, to effect transfer of property. Without the consent of the parties even Civil Courts cannot create charge on immoveable property to secure the payment of an instalment money-decree in default of satisfaction of the decree. When there is no consent, the award becomes illegal and the Court will set it aside under Rule 15 of the Second Schedule as being otherwise invalid.

Under Order 23, rule 3, the Court shall order the compromise to be recorded. Similarly the award, if lawful, shall be recorded by the Court. Under Article 12, five rupees stamp is legal. So the award can be said to over-ride the provisions of the Articles 40 and 23 of the Indian Stamp Act, II of 1899, and secs. 54 and 58 of the Transfer of Property Act. Under sec. 17, para. 2, cl. (vi), of the Indian Registration Act, XVI of 1908, an award is exempt from registration. It is not within the discretion of the Court to file or to refuse to file the award, unless objections are shown under rules 14, 15, Sch. II of the Civil Procedure Code. See 6 B. L. R., p. 478, and no Court should do otherwise on the supposed ground that such awards aim at circumventing the fiscal enactments of Stamp and Registration.

Some of the subordinate Civil Courts however fight shy of such awards from fear that they may infringe the Stamp and Registration Laws, while other Courts feel no hesitation in filing them and passing decrees. Why should there be such a divergence of practice, which in many cases inflicts great hardship upon the litigant world, who prefer to have recourse to such awards for the sake of greater convenience and avoiding litigation and expense? It is the policy of our Courts and no less of the State to discourage litigation.

It is therefore right that the Superior Courts in India should in accordance with the views of the Calcutta, Madras and Bombay High Courts, by their rules and orders or by their judicial pronouncements secure uniformity of practice in all the mofussil Civil Courts in this respect

N. HUBLIKER.

CURRENT INDIAN CASES.

(CIVIL.)

Provincial Insolvency Act (III of 1907), secs. 15, 16.

TRILOKI NATH v. BUDRI DAS, I. L. R 36 All 250

If a debtor presents a petition asking that he should be adjudged an insolvent and if his debts exceed Rs. 500, the Court is bound to adjudicate him an insolvent provided the petition fulfils the requirements of sec. 11.

Mortgage.

INDARPAL SINGH v. MEWA LAL, I. L. R. 36 All. 264.

The Plaintiff brought a suit for sale upon a mortgage. Prior to the execution of that mortgage another mortgage had been executed in favour of another person. A suit was brought by the prior mortgagees and a decree was obtained by them under a compromise to which the present Plaintiffs were also parties. After the compromise was made the Plaintiffs brought a suit on the basis of their mortgage-deed for a simple money decree and they did not seek to enforce their right to bring the mortgaged property to sale. In that suit a decree was passed in favour of the Plaintiffs, but as the amount of decree was not paid, the Plaintiffs brought the suit out of which this appeal has arisen to enforce the mortgage.

Held—That the former proceedings were no bar to the present suit.

Non-payment of promised donation—Suit against heirs if maintainable.

ABDUL AZIZ v. MASUM ALI, I. L. R. 36 All. 268.

A certain committee was formed for repairing and re-constructing a mosque. M was the treasurer of the committee, he himself promised a certain amount as subscription. Subscription collected from different persons were handed over to M. After M's death the Plaintiffs who were the members of the Local Islam Agency which had contributed a substantial amount to the fund, brought a suit against the heirs of M for the recovery of the money of the fund including the promised donation by M himself.

Held—That with regard to the subscription of M this was a mere gratuitous promise on his part. If the promise had been made by an outsider, it could not have been enforced and it did not make any difference that M himself was the treasurer, there being no evidence that he ever set aside a sum to meet his promised subscription.

Mahomedan Law—Appointment of guardian—Guardians and Wards Act (VIII of 1890).

ASHGAR ALI v. AMINA BEGAM, I. L. R. 36 All. 280.

A person is not entitled to be appointed a guardian of his wife's minor sister either of her person or poperty under the Mahomedan law. The legislature contemplates that an applicant for guardianship should reside within the jurisdiction of the Court to which he made the application.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION—Before the LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE and MR. JUSTICE ROWLATT. **In the Matter of a Solicitor—Ex Parte. The Law Society.** July 30th 1914.

Striking a Solicitor off the rolls for an offence, although not committed in the course of his profession.

This was a case of a solicitor who had been found guilty of a number of offences by the Society. It was found that he had received money from a client, but had not paid it over to the solicitor for the other side. Again he obtained valuable jewellery from a jeweller on a false pretence, and subsequently pawned it for his use. It was urged on his behalf that the charge as to the jewellery was not one in relation to his professional conduct, and that the Court ought not to take action in regard to it. That was a matter for the ordinary Criminal Courts to punish.

The LORD CHIEF JUSTICE—Suppose a solicitor

admitted to the Law Society that he had been picking pockets, could the Society not consider that as professional misconduct?

SIR F. LOW—The Law Society is concerned with wrongful acts done by a solicitor as such.

MR. PAINE pointed out that the extent of the misconduct which might be considered had been settled in IN RE WEARE ([1893] 2 Q. B., 439).

The LORD CHIEF JUSTICE, in delivering judgment, said that on the charge of not paying over the money for costs he would not himself have been prepared to give the extreme penalty; but the jewellery charge was a grave one, and it was impossible in view of the grave dishonesty not to hold that the solicitor be struck off the rolls.

Mr. T. T. Paine for the Law Society.

Sir Frederick Low, K. C., and Mr. Tobin, K. C., for the Solicitor

B. D.

COURT OF APPEAL—Before THE MASTER OF THE ROLLS, LORD JUSTICE SWINFEN EADY and LORD JUSTICE PICKFORD. **Channel Collieries Trust (Limited) and others v. Dover, St. Margaret's and Martin Mill Light Railway Company and others.** July 9th 1914.

A Director's power to allot shares and to fill up vacancies among directors.

This was an appeal from a decision of Sargant, J. The Plaintiffs sought an injunction against certain directors of the Company, to restrain them from acting as directors and allotting shares to themselves. By a resolution of the Company, it was necessary there should be three directors. On a certain day, however, there was only one director, and he proceeded to appoint two persons named Proffitt and Jackson as directors. These persons had not the requisite share qualification at the time, but after the appointment the three directors purported to allot to Proffitt and Jackson the number of shares, in order to qualify them. The Court below held that the Plaintiffs were entitled to the injunction, although it was of opinion that under sec. 99 of the Companies Clauses Act, 1845, the allotment of shares was valid. But as the director insisted upon re-appointing Proffitt and Jackson the granting of the injunction was held to be nugatory.

The present appeal of the Plaintiffs was dismissed. The Master of the Rolls in the course of his Judgment said as follows:—

It seemed to him that the real question was whether the parties were or were not acting in good faith. If they were acting in good faith, sec. 99 ought to be available. Of course, persons who were not acting in good faith would not be allowed to take the benefit of the section.

The attention of the Court had been called to the case of IN RE STAFFORDSHIRE GAS COMPANY (66 L.T., 413), in which MR. JUSTICE KEKEWICH held that the section only applied where the parties had no knowledge of the defect in fact. MR. JUSTICE SARGANT had passed that case by with the remark that it had been decided before the cases of DAWSON v. AFRICAN CONSOLIDATED COMPANY, (1898) 1 Ch. p. 6 and BRITISH ASBESTOS COMPANY v. BOYD (1903) 2 Ch. 439. He (the Master of the Rolls) could not but think that if the decision in DAWSON v. AFRICAN CONSOLIDATED COMPANY (*supra*) could have been before MR. JUSTICE KEKEWICH he would have taken a different view. So far as he was aware, the observations of the learned Judge in the SOUTH STAFFORDSHIRE GAS COMPANY (*supra*) had never been called to the attention of the Courts and had never been followed. He thought that those observations were wrong, and so long as the parties were acting in good faith, their knowledge of the facts was not sufficient to disentitle them to rely upon the section. LORD JUSTICE LINDLEY in DAWSON v. AFRICAN CONSOLIDATED COMPANY (*supra*) had pointed out that such general language as that of this section ought not to be cut down, and he thought that they should give it the wide construction which the Court of Appeal and Lord Justice Farwell had attributed to it.

Mr. Mark Romer, K. C., and Mr. R. Roope Reeve for Appellants.

Mr. Martelli, K. C., and Mr. H. S. Preston for Respondents.

B. D.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD DUNEDIN.
LORD SHAW
LORD PARKER
SIR JOHN EDGE
MR. AMEER ALI.
1914,
20, October.

LALA RAM LAL
v.
MUSAMMAT WILAYETI BEGAM
and others.

Special leave granted in connected suits.

This was an application for special leave to appeal from a judgment and decree of the Allahabad High Court, dated the 12th May 1913. The Petitioner instituted two suits for sale against the Defendants in the Court of the Subordinate Judge of Shahjahanpur, on mortgage bonds executed by Musammat Wilayeti Begam and her husband Ghulam Husain, in 1893 and 1894. They were tried by two different Subordinate Judges. The claim in one suit was allowed, but that in the other was dismissed. In the first, the Court found that the execution of the bonds by the lady was proved, but in the second it was found that the bonds in dispute in that suit had not been sufficiently proved. Both parties appealed to the High Court, which dismissed the Plaintiff's claim in both suits, holding that none of the bonds were proved to have been executed by the lady. In one suit the High Court granted the usual certificate to the Plaintiff to appeal to His Majesty in Council, but in the suit in which the High Court affirmed the judgment of the Court below, it refused leave to appeal. Hence this application.

Mr. L. De Gruyther, K. C., and Mr. Bhugwandin Dubé for the Petitioners submitted that the two suits were essentially connected with each other, and that the questions arising for determination on both appeals were substantially the same, and that special leave ought to be granted to the Petitioners.

Their Lordships granted the Petition.

Solicitors: Barrow, Rogers and Nevill.

B. D.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 422 OF 1911.

IMAM, J.

1914, 15, June.

RAM CHURN LAW

v.

SHAHIBZADA FATIMA BEGUM and ors.

Waqf, *dedication of rents and profits of immoveable property for annual performance of Mohurrum, if valid.*

A Mahomedan of the Sunni sect conveyed immoveable property to his granddaughter under a deed of waqf, *the purpose of the dedication being stated to be service of Imam Hossain and Hassan and for religious purposes" and gave directions in the deed to apply the rents and profits "to the due and proper observance of the annual Mahomedan festival of the Mohurrum."*

Held—*That such dedication was valid and operated as a* waqf *and the property was inalienable by sale or mortgage.*

DELROOS BANOO BEGUM *v.* ASHGURALLY KHAN (1), *distinguished.*

One Prince Mahomed Syeduddin possessed and owned amongst other properties the house and premises No. 63, Dhurrumtola Street. For natural love and affection he conveyed the said property by a deed of gift to his granddaughter on the 28th March 1863. In pursuance of the deed the said granddaughter took possession of the said property. By mutual agreement the said property was thereafter reconveyed by the donee to the donor on the 17th of April 1863. On the 15th of July 1864 the donor again executed a deed conveying the property to the said granddaughter and her brother. This last conveyance was "for the service of Imam Hossain and Hassan and for religious purposes." This deed directed the donees, after payment of collection expenses and costs of repairs, to apply the income to the due and proper observance of the Mahomedan festival of the Mohurrum.

Mr. B. Chakravarti (with him *Messrs. J. E. Baggram* and *Ghatak*) for the Plaintiff.—The donor adopted this device for the purpose of constituting his two grandchildren the sole beneficiaries. In order to perpetuate the property the donor entered in the deed a condition absolutely restraining the donees and their heirs and representatives from alienation of the corpus of the said premises. The intention of the donor was to give the said premises to his two grandchildren conjointly. The condition against alienation therefore is illegal and void. The gift takes effect in accordance with the true tenor and intention. The invalid condition against alienation must be ignored : *Delroos Banoo Begum* v. *Ashgurally Khan* (1).

Mr. A. Rasul (with him *Messrs. Zakir Ali* and *Ashraf Ali*) for the Defendant.—We deny that the object of the donor was to create a *waqf* for the purpose of perpetuating the said property in his two grandchildren and their descendants or to give them any beneficiary interest. The *waqf* is a valid document binding on all the parties. The restraint on alineation and other provisions contained in the document are quite legal and consistent with the nature of the trust created therein. They only prove the absolute nature of the trust. The trustees therefore have no beneficial or saleable interest therein. They have no right to mortgage. Hence the mortgage is inoperative and void. Referred to Wilson's Mahomedan Law, p. 322, Rahim's Tagore Lectures, p. 305, *Zooleka Bibi* v. *Zeynul Abdin* (2), *Bibi Jan* v. *Kalb Hussain* (3), *Abdul Kader* v. *Bin Saflabu* (4).

(1) 15 B. L. R. 167 (1875).

(1) 15 B. L. R. 167 (1875).
(2) 6 Bom. L. R. 1058 (1904).
(3) I. L. R. 31 All. 136 (1908).
(4) I. L. R 36 Bom. 111 (1911).

The JUDGMENT OF THE COURT was as follows :—

IMAM, J.—In this suit the Plaintiff seeks declaration of his title to and possession over a half share in permises No. 63, Dhurrumtola Street, in the town of Calcutta and a consequent partition of the said premises. The facts material to this case are shortly these : One Prince Syeduddin, a Mahomedan of the Sunni sect, owned and possessed several valuable properties in Calcutta, one amongst them being the premises of which a half share is in suit. He conveyed the said premises to his granddaughter Sahibzada Fatima Begum and his grandson Faizuddin under a deed of *waqf*, dated the 15th of July 1864, the purpose of the dedication being stated in the deed to be " service of Imam Hossain and Hassan and for religious purposes," in the manner mentioned in the deed. The direction to Fatima Begum and Faizuddin and to their successors in the trust under the endowment is to apply the rents and profits of the premises after defraying the cost of collection and repairs " to the due and proper observance of the annual Mahomedan festival of the Mohurrum."

On the 20th September 1907, Fatima Begum mortgaged a half share of the premises to the Plaintiff for the consideration of Rs. 16,000 advanced to her by the latter. The debt not having been repaid, the Plaintiff sued Fatima Begum on the mortgage and obtaining a mortgage decree purchased the half share of the premises at the execution scale. Before the sale Nurul Huq, a son of Fatima Begum, addressed a letter through his attorney to the Registrar of this Court requesting him to notify to the intending purchasers at the sale Nurul Huq's protest that the property was a *waqf* and that Fatima Begum had not a saleable interest. The Plaintiff having failed to secure possession of the half share purchased by him has instituted this suit against Fatima Begum, Nurul Huq, her son, and the other Defendants who are the descendants of Faizuddin. The suit, however, has been contested by the Defendants other than Fatima Begum and Nurul Huq. The Plaintiff's contention is that the deed of the 15th August 1864, though on its face purporting to dedicate the property as *waqf* to religious uses, was in effect a deed of gift, the donor having adopted the device of a *waqf* in order to preserve the property for the benefit of the donees. The contesting Defendants assert the validity of the alleged *waqf* and deny the Plaintiff's title to a moiety of the premises. There is only one issue that is material to the decision of this case, namely, whether the deed of the 15th July 1864 is valid and operative as a deed of *waqf*. For the Plaintiff, two objections are taken to the deed—(1) that the object of the *waqf* is not valid under the Mahomedan Law, (2) that the conveyance was in reality a gift, dedicating the property " in the way of God " not being the intention of the donor. It is contended for the Plaintiff that in the deed there is no indication that a general benefit was intended to be conferred on the Mahomedan public and a reference has been made to the case of *Delroos Banoo Begum* v. *Ashgurally Khan* (1) in support of the proposition that the observance of the Mohurrum by a Mahomedan is a matter essentially of a private character. I cannot accede to the proposition in the general way it has been put. If the observance of the Mohurrum entails the feeding of the poor and distribution of alms to the needy, as it undoubtedly does, the dedication of the property to such use constitutes the service of man and the good of humanity, though to a limited section. Apart from

(1) 15 B. L. R 167 (1875)

RAM CHURN LAW *v.* SHAHIBZADA FATIMA BEGUM.

the help to the poor and the needy, the commemoration of the historic events of Karbala, keeping alive, as it does, some of the best traditions of Islam, is to my mind as good a purpose as the followers of a faith can have. I see in it the visualization of the grandest examples of courage and endurance and all that is heroic in man, from the pages of Islamic history, and I think it would be wrong to exclude it from objects valid for *waqf*. In the case of *Delroos Banoo Begum* v. *Ashgurally Khan* (1), the decision rested on considerations that do not affect the present case. The Imambara in that case was a part of the private dwelling house of the Begum; in the present instance there is not the maintenance of a Imambara attached to a private house that is the purpose of the *waqf*, but it is the keeping up of the Mohurrum as an institution with all its moral effect on the general Mahomedan public. The contention that Prince Syeduddin adopted the device of a *waqf* and in effect made a gift is not borne out by any of the circumstances of the case. The value of the premises, half of which is in suit, was admitted to be Rs. 1,43,000 only in 1864. The Prince about that time made certain dispositions of his other properties of the value of more than Rs. 58,000 in favour of Fatima Begum and Faizuddin and the deeds relating to these properties do not show that he adopted any device to preserve them for his grandchildren for all times. Had it been his intention to tie up the properties for their benefit by a device, we should have had a *waqf* of all the properties and not merely of the premises in suit. I hold that the deed of the 15th July 1864 is valid and operative as a deed of *waqf*. In this view Fatima Begum had not a saleable interest in the property and the Plaintiff by his purchase obtained no title to it. The suit is, therefore, dismissed with costs on scale No. 2, including reserved costs, if any.

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Mr. N. C. Mandal, Attorney for the Plaintiff.

Messrs. Alum and *Nan*, Attorneys for the Defendants.

A. K. G. *Suit dismissed.*

[CIVIL APPELLATE JURISDICTION.]*

APPEAL FROM APPELLATE DECREE No. 2301 OF 1911.

CHAPMAN, J.
NEWBOULD, J.
1913,
24, April.

RAMDAS MUKERJEE and ors., Defendants, Appellants,
v.
BIPRODAS PAL CHOUDHERY, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885)—Record-of-rights—Sec. 105, applicability of—Sec. 103A, if precludes enquiry as to correctness of entry—Sec. 109A, when bars on appeal—Jurisdiction.

Where on an application by a landlord under sec. 105 of the Bengal Tenancy Act for settlement of fair rent wherein he claimed enhancement against a tenant who was wrongly entered in the record as korfa, *and the purpose of whose tenancy was described as residential, the special Judge enhanced the rent:*

Held, *that the decision of the Special Judge was without jurisdiction inasmuch as the tenancy was not governed by the Bengal Tenancy Act and the tenant was not estopped from raising this plea.*

The provision of sec. 103A of the Tenancy Act that the publication of the record-of-rights shall be conclusive evidence that it has been duly made under the Chapter does not preclude a Court from enquiring as to the correctness of the resultant entry; it only precludes the Court from going into the question whether the procedure under the Chapter has been followed.

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Sec. 109A of the Tenancy Act is no bar to an appeal in a case of settlement of rent in which a question of jurisdiction is definitely raised.

This appeal arose out of an application under sec. 105 of the Bengal Tenancy Act for settlement of fair rent. The application was made during the course of proceedings under Chapter X of the Bengal Tenancy Act after a record of rights had been prepared and finally published in the year 1909. The applicant claimed enhancement of rent on the grounds (1) that the rate of rent paid by the Defendant was below the prevailing rate, (2) that there had been an increase in the area of the holding, and (3) that there had been a rise in the price of staple food-crops. The tenant was entered in the record as *Korfa*. The Revenue officer found that the Defendant's lands "consist of non-agricultural homestead and the Defendant has been given no status under the Bengal Tenancy Act" and held that the application under sec. 105 did not lie. He dismissed the application. On appeal the Special Judge reversed the decision of the Revenue officer and enhanced the rent of the tenancy on the ground that it was below the prevailing rate. The following portion of his judgment will be found material :—
"It was contended that as the Defendants had been entered as tenants in the finally published record of rights they were estopped now, when the landlord wanted to enhance their rents, from raising the plea that the provisions of the Bengal Tenancy Act were not applicable. The contention, in my opinion, is not without some force in it. Until the landlord applied for a settlement of fair rents, the Defendants never thought of raising any objection to the entry; in a way admitted its correctness. They ought not, in my opinion, to have been allowed to raise the plea. Then again if they were allowed to do so at all after the record of rights had been finally published, it ought to have been held that the onus to prove that sec. 182 of the Tenancy Act had no application to these cases was decidedly on the Defendants. The Defendants did not adduce any evidence to shew that they were not raiyats or that there was any local custom or usage which would override the provisions of the Bengal Tenancy Act and which would regulate their homestead tenancies. I therefore hold that the Defendants were estopped from raising the plea that the provisions of the Bengal Tenancy Act were not applicable to their homestead lands."

The tenant Defendant appealed to the High Court against the decision of the Special Judge.

Babu Jogendra Nath Mukherji for the Appellants.

Babu Amarendra Nath Bose for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a case under sec. 105, Bengal Tenancy Act. The learned Special Judge has enhanced the rent of a tenancy on the ground that it is below the prevailing rate. The tenant appeals. A preliminary objection has been taken by the Respondent that, having regard to the provisions of sec. 109A of the Bengal Tenancy Act, as the decision of the learned Special Judge was one settling a rent, no appeal lies.

As the appeal has been argued, the question that we have to decide is, not whether the rent was rightly settled, but whether the learned Special Judge had jurisdiction to settle rent at all. We are of opinion that sec. 109A is no bar to an appeal in a

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case of this kind in which a question of jurisdiction is definitely raised.

The first ground taken in appeal is that the learned Special Judge had no jurisdiction, inasmuch as the tenancy was not governed by the provisions of the Bengal Tenancy Act. This was the view taken by the Settlement Officer. It is clear that the reasons which the learned Special Judge gives for over-ruling the decision of the Settlement Officer on this point are based upon a misconception. He proceeds on the assumption that the tenant had been entered in the record as a raiyat. The tenant has not in fact been entered in the record as a raiyat. The entry is *korfa*, a word which certainly does not mean "raiyat."

We have endeavoured to ascertain what meanings the word *korfa* can bear. We have only been able to find one, namely, "under-raiyat." Now the tenant was manifestly not an "under-raiyat." The entry was therefore clearly wrong in that respect.

Now the entry describes the purpose of the tenancy as residential. This appears to accord also with the facts and with the view of the Settlement officer. This being so, we hold that the Tenancy Act did not apply. The learned Special Judge had no jurisdiction.

We have had regard to the provision in sec. 103A of the Act to the effect that the publication of the record shall be conclusive evidence that the record has been duly made under the Chapter. But we understand this provision to mean only that a Court is precluded from going into the question whether the procedure under the Chapter has been followed. It does not preclude a Court from enquiring whether the resultant entry is correct.

The result is that the decree of the Special Judge is set aside and that of the Settlement Officer is restored. The Appellant is entitled to his costs in all Courts.

H. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2322 OF 1909.

MOOKERJEE, J. BEACHCROFT, J. 1914, Heard, 31, March. Judgment, 8, June.

AKHOY KUMAR BANERJEE and ors., Defendants, Appellants, *v.* CORPORATION OF CALCUTTA, Plaintiff, Respondent.

*Calcutta Municipal Act [III (B. C.) of 1899], secs 223, 228—Consolidated rate, arrears of, if a charge on premises in the hands of a purchaser—Charge if limited to arrears for one year—*Bonâ fide *purchaser for value without notice if bound by charge —Defence of* bonâ fide *purchase for value without notice, single defence—Onus of proof—Duty of foreclosing mortgagee and private purchaser to ascertain arrears due from Municipal authorities—Constructive notice.*

The operation of sec. 228 of the Calcutta Municipal Act, which makes the consolidated rate, as it accrues due from time to time, a first charge on the property (subject to arrears of land-revenue) is not controlled by sec. 223 of the Act which provides only for the personal liability of the purchaser of the premises to the extent of the arrears for the year immediately prior to his purchase.

The charge under sec. 228 cannot be enforced against a bonâ fide *purchaser for value without notice.*

It is for the purchaser to plead and prove that he is a bonâ fide *purchaser for value without notice.*

The plea that one is a bonâ fide *purchaser without notice is a single defence, the onus of proving which is on him.*

A mortgagee of property within the limits of the Calcutta Municipality fore-

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closing the mortgage acquires title by involuntary alienation.

Nevertheless, as such a person could ascertain by enquiry from the Municipal authorities the arrears of consolidated rate due, he is in the same position as a purchaser with notice of the arrears.

This was an appeal from a decision of Babu Mohim Chandra Sircar, Sub-Judge, 24-Parganas, dated 1st July 1909, modifying that of Babu Anil Chandra Datta, Munsif, Sealdah, dated 27th February, 1909.

The Appeal arose out of a suit by the Corporation of Calcutta for a declaration that certain arrears of rates due in respect of premises No. 49 Tangra Road were a charge on the said premises and for an order for sale of the said premises in case the Defendants should make default in paying up the same within a period to be fixed by the Court. The Appellants who were some of the Defendants had purchased the house subsequent to the accrual of the arrears in suit, and they urged that they had paid up the arrears due for the year preceding their purchase as required by sec. 223 of the Calcutta Municipal Act, and that they were not liable to pay any previous arrears including those in suit.

The Munsif held that by virtue of sec. 228 which declared the rates a first charge on the premises, the rates "appeared to have the effect of a first mortgage—that they were an incumbrance on the property even in the hands of a *bonâ fide* transferee for value," but that the Defendants in this case could not even plead want of notice "for an enquiry in the Municipal Office which was a public office would have disclosed the debt." The Subordinate Judge on appeal affirmed the decision of the Munsif, but varied the decree made by him by declaring that the Defendants would not be personally liable for the amount decreed.

Babu Nagendra Nath Ghose for the Appellants submitted that the Appellate Court was wrong in holding that the arrears of rates were binding on all purchasers. The distinction between a mortgage and a charge had been overlooked. A charge is an equitable claim enforceable against certain persons including a purchaser with notice. A mortgage is an interest in the property, and the property is bound in the hands of the purchaser in the same way as in the hands of the original owner, because the purchaser buys the residue of the interest left after the mortgage. The distinction has been accepted by the Legislature here in secs. 58 and 100 of the Transfer of Property Act. The charge under sec. 228 moreover attaches to the premises as well as to the moveables thereon. It would be absurd to hold that persons buying furniture or provisions take them subject to the arrears of rates due by the owner of the premises off which they are sold. Submits further that taking the provisions of the Act relating to rates and their realisation as a whole it was not intended that the property in the hands of a purchaser should be liable for more than the one year's rate for which he is made personally liable and in respect of which only he is a "defaulter." Reads the sections cited in the judgment and submits that besides distress (which is regulated by other provisions) the only other remedy given by the Act to the Municipality is a suit under sec. 227 and such a suit only lies against a defaulter and for arrears for which he for the time being is personally liable. When the premises do not change hands, the owner is personally liable for all arrears; when it has changed hands, the purchaser is personally liable for one year's back arrears and of

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course those which fall due after his purchase.

Mr. S. P. Sinha (with him *Babu Debendra Chandra Mullik*) submitted that in the first place there was no plea raised in defence that the Defendants were purchasers for value without notice. The plea should be specifically taken and proved. Besides, Municipal rates stand on a different footing from other charges. They are made charges on the premises, because the premises benefit by the services performed by the Municipality. Also it is the obvious duty of every purchaser of premises in Calcutta to enquire what rates are due. They can be readily ascertained by enquiry at the Municipal Office. As a matter of fact the Defendants did enquire and pay 1 year's arrears. The Act gives the Municipality power to recover arrears by distress, but other remedies available either under the Act or under the general law are not affected. The provisions of sec. 228 are perfectly general. They apply to all arrears. The charge created by the section must be worked out by the ordinary procedure of the Courts.

Babu Nagendra Nath Ghose in reply.—This was the first case since the Act was passed in which the Municipality has sought to recover past arrears by sale of the premises in the hands of a purchaser—one not liable personally for the arrears. If the plea of purchase for value without notice has not been clearly taken, it is due to the novelty of the claim. There can be no doubt that that was the defence intended to be taken. That the Defendants are purchasers without notice was never questioned. The position claimed by the Municipality and upheld in the lower Courts was that of a mortgagee. If it be correct that my clients would be bound by the arrears only if they purchased with notice, opportunity should be given to them to show that they were purchasers without notice. It is a question of fact and a definite issue should be framed. As to the charge for rates being different from all other kinds of charge, it is difficult to conceive how the premises or the moveables thereon (apart from the owner for the time being) is permanently benefited by the services, *e.g.*, by the light from the lamp-post or the water running through the pipes out from taps. Either it is a mortgage or a charge. If it is not the former, a purchaser for value without notice is safe.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by four of the Defendants in a suit to enforce payment of money charged upon immoveable property. The land and buildings in suit lie within the jurisdiction of the Municipal Corporation of Calcutta and were originally owned by Saudamini Dasi. On the 11th September 1897, she executed a mortgage of this property by way of conditional sale. On the 13th January 1903 her right, title and interest were sold in execution of a decree for money against her and were purchased by Haricharan Ojah, the first Defendant to this suit. In 1904, the mortgagee, Bankubehari Ghose, sued to enforce his security, obtained the usual foreclosure decree, and ultimately, w5) : the decree was made absolute, becerest full owner of the property. On the char February 1907, Bankubehari Ghose tit of tl ferred the property to the four pereen i who are Defendants other than the arties Defendant to this suit. On the 2 J. August 1908, the Corporation of Calcutt commenced this action against the five Defendants to enforce a charge on the property in their hands in respect of arrears of consolidated rates. These arrears had

accrued due during the three years from the 1st April 1903 to the 31st March 1906. The first Defendant resisted the claim on the ground that she was not the owner in possession of the property and that no personal decree could be made against her. The remaining four Defendants contended that there was no statutory charge enforceable against the property in their hands, and that as the arrears had accrued due more than one year before they became owners of the property, no personal decree could be made against them. The Courts below have dismissed the suit against the first Defendant as also the claim for a personal decree against the other Defendants. But they have made a decree which entitles the Corporation to realize the arrears by sale of the land and buildings, if the decretal amount is not paid within thirty days of the decree. On the present appeal, which has been preferred by the Defendants other than the first, two points require consideration, namely, first, whether an arrear of consolidated rate is a charge on the land and buildings in respect of which it has accrued due; and, secondly, if there is such a charge, whether it can be enforced against the property in the hands of the present Appellants.

The answer to the first question, namely, whether an arrear of consolidated rate is a charge on the land and buildings [illegible] respect of which it has accrued [illegible] must depend upon the true con[illegible]tion of the provisions of the Cal[illegible] Municipal Act, 1899. For this [illegible]ose, reference may briefly be made [illegible] the relevant sections. The fourth [illegible] of the Calcutta Municipal Act deals [illegible]th the subject of taxation, and comprises Chapters XII to XIX which include secs. 147 to 235. Chapter XII treats of rates. Sec. 147 specifies four different classes of rates, which the Corporation is authorised to impose upon buildings and lands within its jurisdiction. Sec. 149 lays down that these rates are to be levied as one consolidated rate. Sec. 171 makes the consolidated rate payable in equal halves by the owner and the occupier. Secs. 178 and 186 specify the circumstances under which the entire consolidated rate may be levied from the owner or from the occupier. We next come to Chapter XVIII which defines the special procedure for recovery of the consolidated rate. Sec. 212 lays down that the provisions of the Chapter shall be deemed to be in addition to and not in derogation of any powers conferred in other Chapters for the collection or recovery of the consolidated rate. Sec. 215 provides for one mode of realization of the rate, namely, by distress. Sub-sec. 3 of sec. 222 places a restriction upon the recovery, by distress against the occupier, of an arrear due from the owner; no arrear of the consolidated rate can be recovered by distress from any occupier or sub-tenant, if it has remained due for more than one year or if it is due on account of any period for which such occupier or sub-tenant was not in occupation of the premises on which the rate is assessed. Sec. 223 defines the extent of the liability of the purchaser of any building or land for his vendor's share of arrears of consolidated rate; the purchaser is liable for the amount due on account of the owner's share for any period not exceeding one year prior to his purchase. Sec. 227 authorises a suit for recovery of arrears of consolidated rate, in substitution for or addition to the summary remedy by distress and sale. Sec. 228 which makes the consolidated rate a first charge on the premises is in these terms: "The consolidated rate, due in respect of any building or land, shall, subject to the prior payment of the land revenue, if any, due to the Government thereupon, be a

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first charge upon the said building or land and upon the moveable property, if any, found within or upon such building or land and belonging to the person liable for such rate." The language of this section is perfectly plain, and the intention of the Legislature to make the consolidated rate a first charge upon the premises is obvious. But an earnest endeavour has been made, on behalf of the Appellant, to restrict its scope and operation by a reference to sec. 223. It has been argued that as the purchaser of the premises is liable for arrears of consolidated rate, which have accrued due before title vested in him, only to the extent of arrears for the year immediately prior to his purchase, sec. 228 should be so interpreted as to restrict the charge on the property in his hands, only to arrears for which he is liable. This contention is clearly fallacious, as the two sections are concerned with two entirely distinct aspects of the matter. Sec. 223 deals with the question of the personal liability (liability *in personam*) of the purchaser of the premises for arrears unsatisfied when the title vested in him. Sec. 228 deals with the question of the liability of the premises (liability *in rem*) for the rates due thereon. Sec. 228 is perfectly general in its terms and makes the consolidated rate, as it accrues due from time to time, a first charge on the property (subject to arrears of land revenue). The objects of the two sections are radically distinct, and sec. 228 cannot be controlled by sec. 223. We may add that no attempt has been made here to support the view unsuccessfully put forward in the Court below, that the expression "belonging to the person liable for such rate" in sec. 228 qualifies, not only the expression "moveable property," but also the expression "building or land." We hold accordingly that sec. 228 makes the consolidated rate, as it accrues due from time to time, a first charge on the premises.

The answer to the second question, namely, whether such charge can be enforced against the property in the hands of the Appellants, must depend upon the nature and incidents of the charge. A charge is defined in sec. 100 of the Transfer of Property Act in the following terms :—

"Where immoveable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property." The distinction between a mortgage and a charge, thus indicated in sec. 100, is of a fundamental character, and was explained by this Court in the case of *Koyzuddin* v. *Kalinath* (1). There is this well-marked distinction between the two, that a mortgage does, whereas a charge does not, involve a transfer of an interest in specific immoveable property : *Narayana* v. *Venkata* (2), *Tancred* v. *Delagoa Bay Co.* (3) following *Burlinsen* v. *Hall* (4), where Day, J., observed as follows : "A charge differs altogether from a mortgage : by a charge, the title is not transferred, but the person creating the charge merely says that out of a particular fund he will discharge a particular debt."

To the same effect is the decision in *Gobinda Chandra* v. *Dwarkanath* (5) : "a mortgage is a transfer of an interest in specific immoveable property; a charge only secures payment of money out of that property." When liability has been imposed upon property by act of parties, a

(1) I. L. R. 32 Cal. 935 : s. c. 4 C. L. J. 219 (1906).
(2) I. L. R. 25 Mad. 220 (237) (1902).
(3) 23 Q. B. D. 239 (242) (1889).
(4) 12 Q. B. D. 347 (350) (1884).
(5) I. L. R. 35 Cal. 837, 843 (1908).

question of some nicety may arise, whether a mere charge has been created or whether the property itself has been hypothecated. The point is of great practical importance, because, whether the one view is taken or the other, has an important bearing upon the question, whether the property can be followed in the hands of a *bonâ-fide* purchaser for value without notice: *Maina* v. *Bachchi* (6). No such question, however, arises where, as here, only a charge has been created by express words of the Statute, and not a mortgage as in cases under sec. 13 of the Putni Regulation or sec. 171 of the Bengal Tenancy Act. What, then, is the position? The consolidated rate, as it accrued due, became a first charge upon the property, but no interest in such property was transferred by operation of law to the Corporation. The owner continued to be the full owner of the property; the entire interest therein remained vested in him; when he transferred his right, title and interest in the property, the transferee acquired the whole interest therein. The owner was not in the position of a mortgagor, who has in him nothing beyond the equity of redemption and can consequently convey to the transferee no larger interest in the property. From this principle, the conclusion is inevitable that the charge cannot be enforced against the property in the hands of a *bonâ fide* purchaser for value without notice; in other words while a mortgagee can follow the mortgaged property in the hands of a transferee from the mortgagor, a charge can be enforced against a transferee, only if he has taken with notice of the charge: *Kishan Lal* v. *Ganga Ram* (7), *Royzuddi* v. *Kalinath* (1). The question, consequently, arises, whether the Appellants are purchasers for value without notice. Here, it is worthy of note that they did not, in their written statement, plead that they were purchasers for value without notice. If they wished to avail themselves of this defence, they should have pleaded it. It was ruled in *Attorney-General* v. *B. G. Company* (8) and *Wilkes* v. *Spooner* (9), that it is not a case of, first, a defence that the Defendant is a purchaser for value, and then a reply that he had notice, but of a single defence that the Defendant is a purchaser for value without notice, the onus of proving which is on the Defendant. But even if we assume that the defence, though not expressly taken in their written statement, is available to the Defendants, they are in a position of difficulty from which there is no escape. The Appellants are private purchasers of the property, and if they had enquired at the time of their purchase they would have discovered that the rates were in arrears; as a matter of fact, they would be personally liable under sec. 223 for the arrears of the year immediately prior to the date of their purchase, and they admit that they have satisfied such arrears, though they do not disclose whether by enquiry they had ascertained the existence of the arrears before they made the purchase. But let us assume that they had notice of the arrears at the time of their purchase; still, as a purchaser with notice may shelter himself under the title of the person from whom he purchased, if the latter could successfully raise this defence, we must examine the position of the vendor of the Appellants: *Sweet* v. *Southcots* (10), *Macqueen* v. *Farquher* (11), *Barrow's case*

(1) I. L. R. 33 Cal. 985, 993: s. c. 4 C. L. J. 219 (1906).
(6) 3 All. L. J. R. 551 (1906).
(7) I. L. R. 13 All. 28 (44) (1890).
(8) 11 Ch. D. 327 (1879).
(9) [1911] 2 K. B. 473, 486.
(10) [1786] 2 Brown C. C. 66.
(11) 11 Ves. 467 (1805).

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(12), *Wilkes* v. *Spooner* (9). Now, as regards the position of Banku Behary Ghose, the mortgagee who acquired title by foreclosure, he was no doubt not in the position of a private purchaser, and if he had enquired of his mortgagor or the subsequent purchaser of the equity of redemption, neither of them would have been bound to give him any information, such as a vendor is under an obligation to furnish under sec. 55 of the Transfer of Property Act to an intending purchaser of his property. The mortgagee, therefore, was in reality a person who acquired title under an involuntary alienation by his mortgagor; to a person in this position, constructive notice cannot be imputed to the same extent as to a purchaser at a private sale: *Radhamadhob* v. *Kalpataru* (13), *Magu Brahma* v. *Bholi Das* (14). But, by enquiry from the Municipal authorities, he could still have ascertained, whether any arrears of consolidated rate were due. When he took the mortgage, he knew full well that if the rate was not duly paid, the arrears would become a first charge upon the property and would gain priority over his debt; and in our opinion, before he became full owner by foreclosure, he should have ascertained the true state of affairs. He is consequently in the same position as if he had made such enquiry; and the purchasers from him are in no higher position, because, although a purchaser without notice from a person who had notice is protected, *Harrison* v. *Forth* (15), the Appellants cannot claim such protection, as, before they acquired title, they might have by enquiry from the Municipal authorities ascertained the precise period for which the rates were in arrears. We hold accordingly that the Appellants are not entitled to protection as purchasers for value without notice.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

BEACHCROFT, J.—I agree.

Appeal dismissed.

(9) [1911] 2 K. B. 473.
(12) 14 Ch. D. 432 (1880).
(13) 17 C. L. J. 209 (214) (1912).
(14) 19 C. L. J. 352 (1913).
(15) [1695] Prec. Ch. 51.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1539 OF 1913.

HOLMWOOD, J.
CHAPMAN, J.
1914,
29, July.

SRIMATI AMINUNNESSA, Plaintiff, Appellant,
v.
JINNAT ALI and another, Defendants, Respondents.

Under-raiyati, if transferable—Transfer of under-raiyati, effect of—Relinquishment—Right of raiyat to enter on land—Bengal Tenancy Act (VIII of 1885), sec. 49, application of—Ejectment of under-raiyat.

An under-raiyati holding is not transferable.

Where an under-raiyat transfers his whole holding, the landlord of the holding can sue in ejectment without reference to sec. 49 of the Bengal Tenancy Act which in such a case has no application.

This was an appeal preferred on the 19th May 1913 against a decree of T. Johnston, Esq., District Judge of Zilla Noakhali, dated the 22nd April 1913, modifying the decree of Babu Hem Chandra Das Gupta, Munsif at Sudharam, dated the 30th April 1912.

The material facts are set out in the judgment.

Babu Hit Lal Guha for the Appellant.

Babu Hem Chandra Sen for the Respondent.

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The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit brought by the Plaintiff for declaration of her raiyati right in the land in suit and *khas* possession thereof. It appears that the Plaintiff became sixteen annas tenant of an occupancy holding by purchase from her husband in the year 1314 and that she then found that the under-raiyat on the land, who is Defendant No. 2, had sold the under-raiyati to Defendant No. 1 eight years before in 1306.

It is admitted that the lease was only for a term and it appears that now that lease must have expired, since more than nine years have elapsed from the time when it was sold to Defendant No. 1. Be that as it may, it is conceded that the learned Judge's finding that all leasehold property is saleable and that there is nothing in the Bengal Tenancy Act to prevent the sale of an under-raiyati is not a correct view of the law. That is a rule of English law and it is incorporated in the Transfer of Property Act. But the Transfer of Property Act by sec. 117 clearly excludes all agricultural lands from that rule and the true rule is as was laid down by the late Sir Francis Maclean in the case of *Hiramoti* v. *Annoda Proshad* (1), that where a tenure or holding apart from the Transfer of Property Act is not transferable, it cannot become so, unless it is expressly made so by some other statute. The learned Chief Justice pointed out, if it had been intended to make holdings transferable which were before non-transferable, we might have expected the legislature in framing the Bengal Tenancy Act to have said so. It was clearly laid down in 1878 by Chief Justice Garth and Jackson, J. [in *Bonomali* v. *Koylash Chunder* (2)] that *jamai* rights of a *korfa* under-tenant are not transferable without the consent of the raiyat landlord. Mr. Justice Jackson goes so far as to say; "I would only add that I never heard before that the question as to the possibility of selling a *korfa* tenant's right could be raised, and it appears to me to be contrary to the nature of things, that such a thing could happen." The Tenancy Act has not made any change in the law as laid down there, and it must be held as a matter of law contrary to what has been said by the learned Judge in the Court below that an under-raiyati is not transferable.

That being so, and the Plaintiff being the landlord of the entire sixteen annas and the Defendant having transferred the whole holding to Defendant No. 1, the case falls within the second head of the recent Full Bench ruling,—where the transfer of the whole holding has been made, the landlord is ordinarily entitled to enter on the holding, and such a relinquishment as the relinquishment of the whole sixteen annas without any proof of payment of rent or any arrangement made to pay the rent is certainly a relinquishment in fact which would entitle the Plaintiff to eject the Defendant.

It is sought to be argued that an under-raiyat cannot be ejected except under sec. 49 of the Bengal Tenancy Act. But the answer to that is that the Defendant No. 2 has by his own acts ceased to be an under-raiyat and Defendant No. 1 has never obtained the status of an under-raiyat; therefore sec. 49 does not apply. It has further been contended that every transfer does not operate as an abandonment or as forfeiture. But the transfer which is found as a fact by the Munsif in the first Court and has not been set aside by the Judge in the case is certainly such a transfer as would in our opinion constitute a complete abandonment in fact, and what is

(1) 7 C. L. J. 553, 555 (1908).
(2) I. L. R. 4 Cal. 185 (1878).

relinquishment or abandonment has been held by the Full Bench to depend on the substantial effect of what has been done in each case. The substantial effect of what has been done in this case appears to be that the recent purchase has deprived the Plaintiff of the tenant to whom alone she could look for her rent and to whom alone she could look for the proper cultivation of her holding, and we do not know who the Defendant No. 1 may be or whether he is in any way a proper person to cultivate her land. It does not appear that any rent has been paid since the year 1306, at any rate that it has been paid to the Plaintiff.

The appeal must therefore be decreed. The judgment and decree of the lower Appellate Court are set aside and those of the Munsif restored with costs in all Courts to the Plaintiff.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

Appeal from Original Decree No. 338 of 1913.

Jenkins, C. J. N. R. Chatterjea, J. 1914, Heard, 23 and 25, June, and 6 July. Judgment, 9, July.	Haji Cassim Mamooji, Defendant No. 2, Appellant, v. K. B. Dutt and P. Chaudhuri, Receivers, Plaintiffs, Respondents.

Civil Procedure Code (Act V of 1908), Or. XL, r. 1—Receiver, suit by, for possession of immoveable property—Lunacy Act (XXXV of 1858), scope of enquiry under—*Pardanashin *lady, document executed by, under circumstances rendering it inoperative—Suit relating to lunatic's property how to be brought.

The Plaintiffs were the Receivers of the estate of one G who died leaving two widows K and N. On the 8th August 1906 one of the co-widows (N) brought a suit for a declaration that she was entitled to a half share in the estate of G and prayed that the properties might be partitioned and her share allotted to her. In this suit, the Plaintiffs were appointed Receivers with all the powers provided under Or. XL, r. 1, cl. (d) of the Civil Procedure Code. It was further ordered that the Receivers should have power to bring and defend suits in their own name and also should have power to use the names of the Plaintiff and the Defendant. The Plaintiffs instituted the present suit to recover possession of a certain immoveable property and for a declaration that a lease, dated 16th September 1906, purporting to have been executed by N by virtue of which the Defendant claimed to be a permanent tenant was void and inoperative. Subsequent to the institution of the present suit an order was made in the suit in which the Plaintiffs were appointed Receivers that the Plaintiffs as Receivers be at liberty to continue the present suit. It appeared that proceedings under the Lunacy Act were instituted in November 1906 and in those proceedings the District Judge on the 24th September 1907 held that N was of unsound mind and incapable of managing her affairs :

Held—*That ordinarily a suit to recover possession of property can only be brought by him in whom there is a present title to it and by his appointment no property becomes vested in a Receiver. But this rule like all others is subject to modification by the legislature and the Code of Civil Procedure, in Or. XL, r. 1, empowers the Court to confer upon a Receiver all such powers as to bringing and defending suits as the owner himself has.*

That the co-widows of G were the present owners of the property and the suit in which the Receivers had been appointed comprised that property. The Receivers therefore were as competent to

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bring the present suit as the owners would have been.

That the omission of the Plaintiffs to get leave, in the suit in which they were appointed Receivers, to institute the present suit may have consequences adverse to them in that suit, but it cannot affect their powers to bring the present suit.

That the Lunacy Act contemplates only the question of lunacy or sanity at the time of the enquiry; there is no provision in it that the enquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind and the finding of the District Judge in the lunacy proceedings did not carry things back further than the enquiry which commenced in November 1906, and notwithstanding the result of that enquiry, the burden still rested on the Plaintiffs of showing that N was of unsound mind on the 16th September 1906—the date of the execution of the lease.

That N being of unsound mind at the time of the execution of the lease, it created no title in the Defendant which barred the Plaintiffs' right to possession.

That even if lunacy at the date of the execution of the lease was not established, the transaction could not stand, as it did not appear that the lease was explained to N, a pardanashin *lady of weak intellect, and was understood by her.*

Held *(as to the contention that apart from lunacy the transaction would be voidable and not void and could not be avoided by any one but N and in a suit to which her manager was a party)—That the Receivers were competent Plaintiffs even if the lease was not void but voidable.*

That even if a lunatic's manager can sue, still there is no established rule of practice in the Calcutta High Court that requires suits relating to the lunatic's property to be brought by him and not by the lunatic. On the contrary the Code of Civil Procedure contemplates suits by persons of unsound mind whether so adjudged or not. It is true that a person so incapacitated has to sue by a next friend; but a next friend is not a party and the absence of a next friend in the present suit was immaterial.

That, in any case, as the objection did not affect the merits of the decision of the lower Court, under sec. 99, C. P. C., it was not a ground for reversal of that decision.

This was an appeal against a decree of Babu Ashutosh Ghosh, Subordinate Judge of 24-Parganas, dated 9th June 1913.

The facts will fully appear from the judgment.

Dr. Rash Behary Ghosh, Babus Binode Behari Mukherjee, Kritanta Kumar Bose and *Satyendra Nath Mukherjee*, for the Appellant.

Mr. B. Chakraburty, Babus Provash Chandra Mitra and *Norendra Chandra Bose* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This appeal arises out of a suit instituted in the first Court of the Subordinate Judge of the 24-Parganas to recover possession of immoveable property in Bhowanipore, known as 7, Russa Road.

The Plaintiffs are the Receivers of the estate of the late Gopal Lal Seal, and the contesting Defendant and sole Appellant (to whom I will hereafter refer as the Defendant) is Haji Cassim Mamooji.

The plaint includes a prayer for a declaration that a lease executed by Nayan Manjari Dassi, one of Gopal Lal Seal's two co-widows, is void and inoperative.

The Defendant on the other hand maintains that he has a good title to the premises as their permanent tenant and con-

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tends that in any case the Plaintiffs are not competent to bring this suit. I will first give a short narrative of the events that led up to the appointment of the Plaintiffs as Receivers of Gopal Lal Seal's estate.

Gopal Lal Seal, who was admittedly the owner of the property in suit, died on the 25th of May 1907, without issue, but survived by his two widows, Kumudini Dasi and Nayan Manjari Dasi, who thus became his heiresses in the absence of a testamentary disposition. On the 15th of June 1902 Kumudini applied for letters of administration to the estate of her deceased husband. The application was opposed, and was numbered as suit No. 9 of 1902.

On the 21st of July, Gopal Lal Seal's mother and another propounded an alleged will of the deceased, and their application being opposed was numbered as suit No. 11 of 1902. Mr. Donogh was appointed administrator *pendente lite* in suit No. 11 of 1902, but in August 1903, probate was refused and so his appointment terminated. In the same month Mr. Belchambers was appointed administrator *pendente lite* in suit No. 9 of 1902.

On the 8th August 1906 Nayan Manjari commenced suit No. 666 of 1906 against her co-widow. It was afterwards numbered 427 of 1907.

By this suit Nayan Manjari sought a declaration that she was entitled to a half share in the estate of Gopal Lal Seal for the estate of a Hindu widow, and prayed that the properties might be partitioned and her share allotted to the Plaintiff.

On the 29th January 1908 suit No. 9 of 1902 was withdrawn, and Mr. Belchambers, the administrator *pendente lite*, was discharged. On the same day a decree was passed in suit No. 427 of 1907 and thereby Messrs. Shamal Dhone Dutt and Norendra Lal Dey were appointed Receivers of the moveable property and the rents, issues and profits of the immoveable property belonging to the estate of Gopal Lal Seal.

By an order of the 8th January 1910 in suit No. 427 of 1907 the present Plaintiffs, Mr. P. Choudhuri and Mr. K. B. Dutt, were appointed Receivers in the place of Mr. Halder who had succeeded Messrs. Dutt and Dey in that office with all the powers provided under Order XL, rule 1, clause (*d*) of the Civil Procedure Code subject to certain exceptions not material to this case, and it was further ordered that the Receivers should have power to bring and defend suits in their own name and also should have power to use the names of the Plaintiff and the Defendant who were to be indemnified out of the estate and effects of the intestate.

On the 25th of October 1911 this suit was instituted and on the 22nd March 1912 an order was made in suit 427 of 1907 that the Receivers be at liberty to continue the present suit.

It is in these circumstances that the Plaintiffs claim that they are competent to maintain this suit. But before I deal with this point, I will explain the Defendant's relations with the property.

As far back as 1893 the Defendant became a tenant of the property, and though a difficulty was experienced in obtaining a formal lease, this at length was granted for a term of 15 years to expire in November 1908. The person named as lessee was Ismail Khan Mohammed, but it has been accepted by both sides before us that he was a *benamdar* for the Defendant Haji Cassim Mamooji.

But though this tenancy terminated on the 15th November 1908, the Defendant claims to be a permanent tenant under a lease of 16th September 1906 which pur-

ports to be executed by Nayan Manjari Dasi. It is the Plaintiffs' case that this lease is invalid, and so it is that they claim to be entitled to recover possession. First, then I will consider the Plaintiffs' right to sue in their own names.

Ordinarily no doubt a suit to recover possession of property can only be brought by him in whom there is a present title to it, and by his appointment no property becomes vested in a receiver.

But this rule, like all others, is subject to modification by the Legislature and the only question for our consideration is whether in India there has not been such a modification in favour of a receiver.

It is profitless to discuss the English cases on the subject or to seek for guidance from American decisions; in England there is no such statutory rule as there is here, and I have no means of ascertaining what the American law is.

Moreover, there is ample material in Indian enactments and authorities to afford a clue to the solution of the problem propounded. Originally a Receiver could not sue; this is shewn by the decision of Phear, J., in *Wilkinson* v. *Gangadhar Sirkar* (1). That decision was in 1871. In 1877, however, was passed the Civil Procedure Code of that year, and in it was contained the provision which now finds a place in Order XL, rule 1, of the present Code (*see* sec. 503 of the Code of 1877). The present Code empowers the Court to confer upon a Receiver all such powers as to bringing and defending suits as the owner himself has.

This provision is shewn by decisions in Calcutta, Madras and Bombay to have been understood by those Courts as authorising suits by Receivers, and though I am not aware of any judgment in Allahabad to the same effect, I have not met with any decision in a contrary sense.

(1) 6 B. L. R. 486 (1871).

The words of Order XL, rule 1, warrant this view, and I see no reason for putting a narrower construction on the words, or for holding that they do not empower Receivers to bring a suit for recovery of possession of immoveable property even though it may involve the setting aside of a voidable instrument executed by one of the owners who thereby purports to deal with the entire interest.

The co-widows of Gopal Lal Seal are the present owners of the property: and the suit in which the Receivers have been appointed comprises that property. The Receivers therfore are as competent to bring this suit as the widows would have been. It is true, they did not get leave to institute this suit in suit No. 427 of 1907. This omission may have consequences adverse to them in that suit, but it cannot affect their power to bring this suit, nor has any reliance been placed on this omission before us.

The next point that calls for consideration is whether the instrument of the 16th September 1906 furnishes the Defendant with an answer to the Plaintiffs' claim for possession.

If it was a valid document, it would, for it purports to create a permanent tenancy in the Defendant's favour. Its validity, however, has been attacked on many grounds. Thus it is said (1) that Nayan Manjari, the sole executant, was of unsound mind, (2) that at any rate she was an illiterate *pardanashin* lady of weak intellect whose execution of the lease was procured without explanation to her of its terms or comprehension by her of its effect, (3) that at the time of its execution Mr. Belchambers was administrator *pendente lite*, and that she had no interest in or power over the property, and (4) that her interest in the property did not extend beyond a half share.

On all these points the Sub-Judge has come to a conclusion adverse to the Defendants against whom he has passed the decree from which the present appeal has been preferred.

First, then, I will deal with the plea of Nayan Manjari's insanity. This unhappy lady's predicament has been so constantly before the Court in the several litigations in which she is involved that it is particularly necessary that we should be on our guard not to import into this case knowledge derived from other sources, and to see that our decision is based only on the materials afforded by the record in this suit.

The issue for determination is whether Nayan Manjari was of unsound mind on the 16th September 1906.

We start with this that Nayan Manjari is admittedly now of unsound mind.

She was found to be of unsound mind in proceedings under Act XXXV of 1858 instituted as far back as November 1906. By his order in those proceedings of the 24th September 1907 the District Judge of the 24-Parganas held that there could be no reasonable doubt that she was of unsound mind and incapable of managing her affairs. The Act however contemplates only the question of lunacy or sanity at the time of the enquiry; there is no provision in it that the enquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind: *Bodhnarain Singh* v. *Omrao Singh* (2). So the finding of the learned District Judge does not carry us back further than the enquiry which commenced in November 1906; so notwithstanding the result of that enquiry the burden still rests on the Plaintiffs of showing that she was of unsound mind on the 16th of September 1906. The learned Judge was satisfied that this burden was discharged and his estimate of the evidence on this point must necessarily carry great weight with us on appeal. It may, I think, be fairly said here, as it was in the Privy Council decision I have cited, that the burden becomes of a much lighter character when we find that the enquiry which resulted in the adjudication of lunacy supervened within two months of the critical time, the date of the execution of the lease. There is no reason to suppose that this unsoundness of mind could be fairly attributed to anything that occurred in the interval. On the contrary we find the lady's mental condition called in question, though unsuccessfully, as far back as 1892. But more significant of the estimate formed in the family of her previous mental condition is the application on the 14th of July 1906 preferred by her two paternal uncles under Act XXXIV of 1858. This apparently was rejected simply owing to their failure to procure a medical certificate in support of their allegations—a failure due, no doubt, to the fact that she was then residing in the house of her maternal uncle, Kuchil Lal Sen, in Muktaram Babu's Street. Kuchil Lal Sen who had every opportunity of knowing Nayan Manjari's mental condition has deposed before the Sub-Judge that in July and September 1906 it was the same as in July and September 1907, and on this the learned Judge relied as he certainly was entitled to do, and I say this, notwithstanding the contention before us, that Kuchil was entrapped into this statement. In addition to this there is the evidence of Gour Mohun Dey, the brother of the co-widow Kumudini. He deposes to her insanity from 1903. His evidence is undoubtedly open to criticism, and the learned Judge does not expressly refer to it, so that it would be safer not to attach any great weight to it.

(2) 13 M I A 519 (1870).

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The Sub-Judge was obviously not impressed with the evidence by which it was sought to prove Nayan Manjari's sanity at the date of the lease and on this I am in full agreement with him. In so saying I do not forget that in the course of the argument before us, we were repeatedly reminded of the part taken by the Registration clerk, but I attach little or no importance to it. The Sub-Judge therefore was (in my opinion) justified in his conclusion that it is clear that in September 1906 Nayan Manjari was of unsound mind and incapable of managing her affairs.

But if she was of unsound mind then, it is conceded, in view of the interpretation placed by the Privy Council on the Contract Act, that the lease was void. If our decision were final, this would be sufficient for the disposal of this appeal; but as the case may go further, it is right that I should discuss it on the hypothesis that lunacy on the critical date was not established. *Tarakant Banerjee* v. *Puddomoney Dossi* (3). This therefore I will proceed to do, though it must not be supposed that in so doing I feel any doubt as to the Sub-Judge's conclusion on the question of Nayan Manjari's sanity Nayan Manjari on the 16th September 1906 was a *pardanashin* illiterate lady, apparently with no knowledge of English, and even if, as I assume for the present purpose, she was not a lunatic, she undoubtedly was of weak intellect. And yet it is to her that the Defendant went for his permanent lease, though there was an administrator *pendente lite*, Mr. Belchambers, and a senior co-widow, a co-sharer with Nayan Manjari, as to whose sanity there never had been any question. The evidence further shows that at this time there was a firm of Attorneys acting for Nayan Manjari; still they were not consulted, and the lawyer who is supposed to have represented her in this transaction is Monoje Mohun Bose, a Police Court pleader. It is clear beyond doubt that this Police Court pleader in no way protected Nayan Manjari, and did not even take the trouble to ascertain the facts necessary for giving her sound advice, nor did Kuchil in any way look after the lady's interests or give her any effective advice. As he himself says, "the transaction was completed in hot haste", such "hot haste" indeed was there that the lease still contains blanks. The evidence that the document was read or explained to her or its contents or purport understood by her is not worthy of credit, and this omission is all the more serious as the document was in English, a language Nayan Manjari is not shewn to have understood. The Sub-Judge on a consideration of the evidence came to the conclusion that the document was not read over and explained to Nayan Manjari; that she did not know what she was doing, but executed the lease without knowledge of its contents, and that she had no independent advice.

In my opinion this contention is justified by the evidence and I agree with it. Even, therefore, if my finding that Nayan Manjari was insane be not accepted, still the transaction is one which cannot stand.

It has however been argued that apart from lunacy the transaction would be voidable and not void, and therefore, it is urged, it could not be avoided by any one but Nayan Manjari and in a suit to which her manager was a party. I am not aware of any case in which it has been directly discussed and determined whether such a transaction is void or voidable, but in *Lala Mahabir Prosad* v. *Musst. Taj Begum*, Privy Council Appeals Nos. 56 and 57 of 1913, Lord Moulton delivering the judgment of the Privy Council in a case where

(3) 10 M. I. A. 478 at p. 488 (1866).

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the bond of a *pardanashin* lady came in question said, "It follows therefore that as against the present Appellants it must be taken that the terms of the mortgage bond were extortionate and that the lady, the mortgagor, did not understand the effect of the deed by reason of its not having been adequately explained to her. The deed is therefore void and cannot be enforced against her."

It is argued before us that Lord Moulton's remarks were not directed to the distinction between a deed that was void and one that was voidable, and that therefore they must not be read too literally. In the absence of a more searching argument than that addressed to us I must refrain from expressing any definite opinion on the question whether the deed of a *pardanashin* woman is void or voidable, or whether each case must not depend on its own peculiar circumstances. And I am the more impelled to this course, for, in the view I take and have already expressed, the Receivers are competent Plaintiffs even if the lease is not void but voidable. It is sufficient for the purpose of this case to hold, as I do, that the evidence does not satisfy me that the lease on which the Defendant relies was explained to the lady or understood by her.

Therefore the Defendant has failed to discharge the burden of proof that lay on him, and the Receivers are entitled to rely on this defect in his proof whether the lease be void or voidable. I do not overlook the argument that if the lease is only voidable, the suit is incompetent in the absence of the manager. It is contended that to avoid the transaction the manager is or should ordinarily be a party where a transaction is sought to be avoided on the ground of lunacy; but on the hypothesis with which I am now dealing, the lease is impugned on the ground not of the lady's lunacy, but of the inadequate protection of a *pardanashin* lady. Moreover even if a lunatic's manager can sue, still there is no established rule of practice in this High Court that requires suits relating to the lunatic's property to be brought by him and not by the lunatic.

On the contrary the Code of Civil Procedure contemplates suits by persons of unsound mind whether so adjudged or not (*see* Order XXXII, rule 15 and Appendix A "Descriptions of parties in particular cases"). It is true that a person so incapacitated has to sue by a next friend; but a next friend is not a party, and the absence of a next friend in this suit is immaterial. In any case the objection is one of pure technicality and it cannot be suggested that the absence of the manager has affected the merits of the case. And sec. 99 of the Code provides that no decree shall be reversed or modified for error or irregularity not affecting the merits or jurisdiction. To sum up, then, this appears to me to be a peculiarly gross case of overreaching a lady who was in a special degree in need of advice and protection. I have already expressed my opinion that she was of unsound mind at the date of the lease. If I am wrong as to that, still it can hardly be denied that her mind was seriously unbalanced. In this transaction, she received no advice and no protection, and in place of her ordinary attorneys, an uninformed Police Court pleader professed to act of her. No explanation is forthcoming why the Defendant should have gone to her for the lease, and not to the administrator *pendente lite* or the senior and apparently sane co-widow, and in the absence of explanation the course pursued is eminently calculated to excite suspicion. And over and above all this the transaction was one of grave and obvious improvidence.

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I therefore hold that the lease on which the Defendant relies has created no title in him which bars the Plaintiffs' right to possession, though they only sue as Receivers appointed by the Court. It was somewhat feebly suggested in the course of the Appellant's opening that certain Small Cause Court proceedings estopped the Plaintiffs from denying that the Defendant was a monthly tenant and so entitled to notice to quit. But the Defendant declines to be treated as a monthly tenant, and when the Vakil for the Respondent proposed to deal with this point in the course of his argument, he was stopped by his opponent who said he did not press it. I therefore need not deal further with this plainly unsustainable plea. No other argument than those with which I have dealt was advanced as affording an answer to the Plaintiffs' claim for possession.

The result then is that the Plaintiffs have (in my opinion) been rightly awarded a decree for possession. They are also entitled to the mesne profits which have been decreed subject to a small reduction of Rs. 63, the sum accepted by both parties as representing the brief period during which mesne profits would not be payable. The Plaintiffs had filed a cross-objection as to the amount awarded in respect of mesne profits, but they were out of time, and were abandoned without our being asked to excuse the delay. The only topic that remains for consideration is the direction as to the new rooms alleged to have been constructed by the Defendant. This has been left for determination in execution. But this is a survival of a procedure frequently condemned and no longer countenanced. It was a device commonly employed for the purpose of showing a more satisfactory return of work, but is not now sanctioned. The question involved is one that must be decided in the suit before a decree is passed and both sides agree to our sending down an issue for the purpose of arriving at a final decision. We therefore send down the following issues:—What structures were erected by Defendant No. 2 on the land in suit prior to the 15th of November 1908? A description should be given of the structures so created distinguishing such of the structures as come within clause 10 of the lease. Both parties will be at liberty to adduce evidence on this point, and the return to this Court should be made in four months. When the return is made, we will dispose of the whole case and will deal with the question of interest on the Government papers in respect of which a claim is made by the Appellants.

N. R. CHATTERJEA, J.—I agree.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 219 OF 1912.

FLETCHER, J.	NISTARINI DEBYA,
RICHARDSON, J.	Defendant No. 1,
1914,	Appellant,
Heard, 23 and	*v.*
24, June.	BEHARY LAL MUKHERJEE, Plaintiff,
Judgment,	
24, June.	Respondent.

Will, construction of—Indian Succession Act (X of 1865), sec. 111, rule of construction in—Legacy with power to sell, make a gift, etc, in respect of properties bequeathed, if absolute gift to legatee.

*A Hindu in his Will provided as follows:—" I bequeath to both of you (the testator's widow and his brother's daughter) the rest of the properties * * * You will become entitled to sell or make a gift or* heba, *etc., in respect of the said properties and hold and enjoy the same * * * If by the will of God one of you should die before the other, whoever will survive will hold and enjoy the whole of the property as* malik."

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Held—*That the case fell within sec. 111 of the Indian Succession Act and the widow not having predeceased her husband and having survived the period of distribution took an absolute interest under the Will.*

That the ordinary rule of construction when the testator has given an absolute gift to a legatee and then has made a gift over simpliciter *on a contingency of death is that he was referring to death before the period of distribution. This is clearly provided for in sec. 111 of the Indian Succession Act which applies to Hindu Wills.*

The rule in this section is an absolute rule of construction and not a rule of construction which may be contradicted by other evidence appearing on the face of the Will.

This was an appeal preferred on the 2nd May 1912 against the order of Babu Kunja Behary Gupta, Sub-Judge of Zilla Birbhum, dated the 15th February 1912, reversing an order of Babu Tej Chandra Mitter, Munsif at Bolpur, dated the 22nd December 1910.

The material facts will appear from the judgment.

Babu Sarat Chandra Mukerjee for the Appellant.

Babu Karunamoy Bose for *Babu Khettra Mohan Sen* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is an appeal from a judgment of the learned officiating Additional Sub-Judge of Birbhum, dated the 15th February 1912, reversing the decision of the Munsif, first Court of Bolpur. The suit was brought by the Plaintiffs, claiming through one Srimati Sindhubala Debi, who was the widow of one Mohesh Chandra Mukerjee, for an one-half share of the estate of Mohesh Chandra and the sole question that we have got to decide in this case is what is the true construction of the Will of Mohesh Chandra. Mohesh Chandra made his Will on the 30th August 1884. There are first the usual recitals and then the Will runs in the following terms : "I bequeath to both of you," that is, his widow Srimati Sindhubala and Srimati Nistarini, the daughter of his late brother, "by this Will the rest of the properties and also the properties that will exist after the death of my niece (brother's daughter) Srimati Tincouri Debya out of the properties given to her." Then follow these words :—"You will become entitled to sell or make a gift or *heba*, etc., in respect of the said properties and hold and enjoy the same." Now, pausing here for a moment, let us see what is the nature of the interest that Sindhubala and Nistarini, the present Appellants before us, took under the terms of that gift. It seems to me that it is impossible to say that a person to whom a property is given with power to sell, make a gift or *heba*, etc., and I presume, to do anything else he likes with—has an interest less than an absolute interest in the property. Those words in the Will cannot be given effect to except by holding that Sindhubala Debi and the Defendant Nistarini Debi took an absolute interest in the property. Then comes the clause that has given rise to this litigation. "If, by the will of God, one of you should die before the other." Now, what was the testator contemplating when he said "if one of you should die before the other?" What the testator was contemplating when he provided that, if one of them should die before the other, must have been some period which he had in view. The only period that is possible to give effect to on this Will is the period of distribution, that is, if one should die before the estate is liable to be divided between the two ladies. So far as I can

see, on the wording of this Will, it is impossible to hold that the testator had in view the contingency of one of the ladies' dying before the other, which obviously must happen at some time. Then the testator provided that in that event "whoever will survive will hold and enjoy the whole of the property as *malik*." The learned Sub-Judge in the Court below has held that that clause applies only in the case of the death of one of the residuary legatees in the lifetime of the testator, that is, before the period of distribution. That is clearly provided for in sec. 111 of the Indian Succession Act which applies to Hindu Wills and that rule in sec. 111 of the Indian Succession Act is an absolute rule of construction. It is not a rule of construction like the rule in *Home* v. *Pillans* which may be contradicted by other evidence appearing on the face of the Will. The rule laid down in sec. 111 of the Indian Succession Act is a statutory rule of construction which the Courts are bound to follow. It is quite true that, in this case, if one applies the rule laid down in *Home* v. *Pillans*, one arrives at the same result. There is nothing in this Will to show that the testator meant death after the period of distribution. The ordinary rule of construction where the testator has given an absolute gift to a legatee and then has made a gift over *simpliciter* on a contingency of death is that he was referring to death before the period of distribution. That rule has been established and in spite of the elaborate arguments addressed to us by the learned Vakil for the Appellant, I still remain unconvinced that the rule has been departed from in this country. This case falls within sec. 111 of the Indian Succession Act and the widow Sindhubala not having predeceased her husband and having survived the period of distribution, in my opinion, took an absolute interest under the Will. I therefore agree with the judgment of the learned Sub-Judge in the Court below and think that the present appeal ought to be dismissed with costs. We assess the hearing fee at one gold mohur.

RICHARDSON, J.—I agree.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 1329 OF 1911.

STEPHEN, J.
MULLICK, J.
1914,
31, July.

RAMADHIN SINGH
and anr., Defendants,
Appellants,
v.
JADUNANDAN SINGH
and anr., Plaintiffs,
Respondents.

Right to discharge water, not claimed as easement, but as ancillary to ownership of land.

The Plaintiffs were the owners of land on the south of that of the Defendants, on a higher level, and the water falling on the land of the Plaintiffs flowed on to the land of the Defendants who built a bund *on their land so as to obstruct the water accumulated on the Plaintiffs' land from flowing towards the north through the Defendants' land. The Plaintiffs alleged that they were entitled to have the water on their land discharged through the Defendants' land; but they did not claim it as an easement but as a right ancillary to their property which they had not parted with:*

Held—*That there was such a right as that claimed by the Plaintiffs, although the Plaintiffs did not claim the right to discharge their water and did not in fact discharge their water on to the Defendants' land by any definite channel.*

That the duty of the Defendants was to allow the water from the Plaintiffs' land

RAMADHIN SINGH *v.* JADUNANDAN SINGH.

to pass on through their land. It was then open to them to dispose of it in the way they thought best.

This was an appeal preferred on the 29th May 1911 against the decree of Babu Raj Narain Mukerjee, Sub-Judge of Arrah, dated the 17th February 1911, affirming the decree of Lala Damodar Parshad, Munsif of Arrah, dated the 6th June 1910.

The Plaintiffs brought a suit for declaration that the surplus rain water of the Plaintiffs' *takta* passes through the Defendants' *takta* and for removal of the *bund* raised to stop the flow of water and for recovery of damage. The material averments in the plaint were as follows :—

"That the Plaintiffs and Defendants are owners of minor shares of Mouzah Mohim *alias* Barkagaon, Purgana Piro, and some *taktas* have, by *butwara*, been separately allotted to some owners of the said mouzah.

"That the land of the said mouzah is high on the south and low on the north, and consequently the rain-water of the said mouzah has without any interference on the part of anybody been flowing away by the northern side from time immemorial.

"That a Government canal passes through the mouzah; after construction of the canal a *baha* was constructed for the flow of rain-water of the said mouzah and of other mouzahs lying to the south thereof, with the object of protecting the embankment of the canal, and through this *baha* the rain-water of the Plaintiffs' *takta* as also of other mouzahs on the south flows away towards the north.

"That there has been existing an ill feeling between the Plaintiffs and the Defendants, and consequently to injure the Plaintiffs, the Defendants wrongfully and without any right constructed a *bund* in spite of remonstrance on the part of the Plaintiffs, so that the rain-water of the Plaintiffs' *takta* might not flow towards the north through the syphon and *baha* and the accumulating rain-water might damage the crop of Plaintiffs' *takta*.

"That the Defendants have no right to construct the *bund* in question, nor have they any right to do such things as would obstruct the flow of the rain-water of the Plaintiffs' *takta* towards the north."

The Munsif in the course of his judgment held—

"The Plaintiffs claim right under natural easement. It has been held in the case of *Abdul Hakim* v. *Gonesh Dutt* (1), that the right of the owners of high land to drain off its surplus surface water through the adjacent lower grounds is incident to the ownership of land in this country. Thus such right being incident to ownership, no long user is necessary to ripen it. It has been proved beyond any reasonable doubt that the general slope of the country is from south to north and that surplus rain-water passes from south to north."

The Munsif decreed the Plaintiffs' suit in the following terms :—

"That the Plaintiffs' right to drain off surplus rain-water of their *takta* through the Defendants' *patti* is declared and the Plaintiffs' claim for damage is decreed for Rs. 50. That the Defendants do remove, within one month from the date of decree, the *bunds* at the points marked "D" and "S" in the Amin's map to the extent of 2 cubits in each point. There can be ridges at these two points not more than 6 inches in height. On failure of the Defendants to carry out the terms of the decree the Plaintiffs will be at liberty to have it enforced in execution according to law. The Plaintiffs to get ¾ths of the costs of the suit, and the Defendants to bear their own costs."

(1) I. L. R. 12 Cal. 323 (1885).

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The Sub-Judge affirmed the decision of the Munsif. The Defendants preferred a Second Appeal to the High Court.

Mr. C. R. Das with *Babu Surendra Nath Ghosal* for the Appellants.

Babus Ram Charan Majumdar and *Raghu Nath Singh* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

In this case the Plaintiffs own some land on the south of that of the Defendants on a higher level, and the water falling on the land of the Plaintiffs naturally flows on to the land of the Defendants. The Defendants recently built a *bund* on their land so as to obstruct the water accumulated on the Plaintiffs' land from flowing towards the north through the Defendants' land. The Plaintiffs allege that they are entitled to have the water on their land discharged through the Defendants' land; but they do not claim it as an easement. They claim it as a right ancillary to their property which they have not parted with. This raises a question in a very simple form, namely, whether there is any such right. On the authorities placed before us, we are of opinion that there is, although the Plaintiffs do not claim the right to discharge their water and do not in fact discharge their water on to the Defendants' land by any definite channel. The duty of the Defendants is to allow the water from the Plaintiffs' land to pass on through their land. It is then open to them to dispose of it in the way they think best. The lower Courts have ordered the Defendants to remove the *bund* which they have created. It is not necessary in order to satisfy the Plaintiffs' claim that this should be done; but it will be sufficient if the Defendants make some arrangement by which the water coming on to their land from the Plaintiffs' land may pass over their land in such a way as not to remain on the Plaintiffs' land. So far, the appeal is allowed.

A second point has been raised in connection with two maps which it is said the Court below refused and which the Defendants say ought to have been judicially noticed. On considering the nature of the case and the course followed, and from what we understand the contents of the map to be, we do not think that the Defendants have made out any grounds for appeal on this ground. We accordingly allow the appeal only to the extent we have indicated above.

Under the circumstances of this case we make no order as to costs.

Appeal allowed in part.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 517 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 3, 4 and 5, March.
Judgment, 9, March.

KATYAYANI DEBI, Defendant, Appellant,
v
PORT CANNING AND LAND IMPROVEMENT CO., Plaintiffs, Respondents.

Indian Registration Act (XVI of 1908), secs. 3, 17—Memorandum of arrangement between lessor and lessee, if must be stamped and registered—Reclamation of lease—Rent if enhanceable beyond the maximum fixed—Maurasi mokurari lease—Lease by agent—Apparent authority—Ratification—Knowledge of principal, if necessary for ratification.

A document, dated the 8th March 1885, which did not demise any property and was neither a lease nor an agreement to lease, but was and purported to be a memorandum of an arrangement which had been made with the grantees by the agent of the lessors on their behalf and under which the grantees had taken possession with effect from 12th April 1884, was admissible

in evidence although neither stamped nor registered.

When land was let out for purposes of reclamation to be effected by the lessees at their expense, though the lessors also undertook to make a contribution thereto, and was to be held for the first four years without rent which was thereafter to be progressive till a maximum was reached, and there was no provision for a further rise, the reasonable inference to draw from these circumstances was that the parties intended that when the specified maximum was reached, there would be no further increase.

Every act done by an agent in the course of his employment on behalf of his principal and within the apparent scope of his authority binds the principal, unless the agent is in fact unauthorised to do the particular act and the person dealing with him has notice that in doing so he is exceeding his authority.

The grantees in this case were entitled to presume that the agent who had admittedly authority to grant reclamation leases had acted with regularity and within the scope of their authority.

Where ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction by the agent.

Before the principal can be held bound by ratification, he must be proved to have had full knowledge or at any rate means of knowledge of all the essential facts of the transaction into which his agent had entered on his behalf.

This was an appeal preferred on the 13th November 1912 from an order of H. P. Duval, Esq., District Judge of 24-Parganas, dated 14th August 1912, reversing a decree of Babu A. C. Batabyal, Sub-Judge, Alipore, dated 18th September 1911.

The facts of the case will appear from the judgment.

Babus Nil Madhab Bose, Baidya Nath Dutt and *Hiralal Chakrabartty* for the Appellant.

Dr. Rash Behary Ghose, Babus Gobind Chandra Dey Roy and *Surendra Kumar Bose* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The substantial question in controversy in this appeal is, whether the rent of the tenure held by the Defendant Appellant under the Plaintiffs Respondents is enhanceable. The Plaintiffs constitute a joint-stock company which has its headquarters in Bombay and its local office in Canning Town. On the 20th October 1876, the company appointed one Cowasjee Edalji as their attorney to take and obtain possession of the property which includes the disputed tenure. On the 8th March 1885 Cowasji Edalji drew up a memorandum which embodied the arrangement made by him on behalf of the company with five persons who were teachers by profession and constituted a company known as "Teacher and Company". The memorandum recited that with effect from the commencement of the year 1291, that is, from the 12th April 1884, Teacher and Company had taken possession of a thousand bighas of land, in three separate parcels within defined boundaries. The jungles were to be cleared by the lessees, the lessor company to contribute to the expenses of reclamation at the rate of Re. 1 per bigha in the case of two of the parcels and at the rate of Re. 1-8 per bigha in the case of the other parcel. The land was to be held rent-free for the first four years; in the fifth year, rent was to be paid at the rate of four annas per bigha; in the sixth year at 8 annas per bigha; in the

seventh year at 12 annas and in the eighth year at Re. 1-1 per bigha. It was further stated that the last mentioned rate of Re. 1-1 per bigha was to be the maximum rate of rent in a *maurasi mokurari* tenure. This memorandum was signed by Cowasji Edalji as agent of the lessor company and also by Dwarkanath Roy, their Superintendent, and was made over to the lessees. It is not disputed that the terms of this arrangement have been carried out and in accordance therewith the lessees have constructed the usual embankments and culverts, have reclaimed the land and have been in occupation thereof. A few years after the memorandum, the land was divided amicably amongst the lessees, and in 1898 the representatives of two of them obtained *maurasi mokurari* leases formally executed in their favour by the lessors. The Defendant Appellant is the daughter and representative in interest of one of the five original grantees. On the 11th March 1910, that is, 25 years after the date of the memorandum of arrangement, the company instituted the present suit for enhancement of rent of the tenure. The Court of first instance held that the rent was not liable to enhancement, but that the company was entitled to have the rent re-adjusted by assessment of excess lands, if any. Upon appeal, the District Judge has held that the tenure was enhanceable and has remitted the case to the Court of first instance for an enquiry as to the fair rent payable. The present appeal is directed against the order of remand.

The first and the most vital question for consideration is, what was the nature of the tenancy? It has not been disputed that if the memorandum of arrangement is a genuine instrument and is admissible in evidence, the tenure was *maurasi* and *mokurari*. In the Court of first instance, objection was taken to the reception of this document in evidence on the ground that it was neither stamped nor registered as required by law. This objection was overruled and the Sub-Judge also expressed a doubt as to its genuineness. Upon appeal, no question of admissibility of the document was raised before the Judge who pronounced in favour of its genuineness, and the case has been decided on the assumption that the document had been properly received in evidence. In this Court, an earnest endeavour has been made on behalf of the company Respondent to support the position that the document is not admissible in evidence. It has been argued that the document is an agreement to lease, if not a lease, and that in either view the document was compulsorily registrable under sec. 17 of the Indian Registration Act, read with the definition of the term "lease" given in sec. 3. Reference has been made to the cases of *Lall Jha* v. *Negroo* (1), *Purnanunddas* v. *Dharsey* (2), *Ramaswamy* v. *Tirupathi* (3), *Champaklatika* v. *Nafar Chandra* (4), and *Mohipal Sing* v. *Lalji Sing* (5) to support the argument that there was a present demise made by the memorandum which was consequently either a lease or an agreement to lease. We are not prepared to accept this contention as well-founded. The document does not demise any property and is neither a lease nor an agreement to lease. It is what it purports to be on the face of it, namely, a memorandum of the arrangement which had been made with the grantees by the agent of the company on their behalf, under which they had taken possession with effect from the 12th April 1884. In this view, the document was rightly admitted by the Court of first

(1) I. L. R. 7 Cal. 717 (1881).
(2) I. L. R. 10 Bom. 101 (1885).
(3) I. L. R. 27 Mad. 43 (1903).
(4) 13 C. L. J. 300 (1910).
(5) 17 C. W. N. 166 (168) (1912).

instance. We may add that in that Court the Defendant called upon the Company to produce the counterpart of the memorandum. Her case was that the memorandum had been drawn up in duplicate, that one copy was given to her predecessor-in-interest and that the other copy was retained by the company. On behalf of the company, it was stated that the counterpart had been lost; but it has been explained before us that this did not mean that the company admitted the genuineness of the document produced by the Defendant, but merely indicated that no trace of a counterpart could be found in their office. The company, however, produced a book which contained an abstract of this memorandum, entered some years after the date when the original was executed. This is plain from the circumstance that at the foot of the entry there is a note that the land had been partitioned and the shares of the grantees as arranged amongst themselves are stated in detail. It may be taken then that the entry in the book produced by the company was not contemporaneous with the execution of the memorandum of arrangement. Even if we confine our attention to this entry, it is plain that the tenure was intended to be *maurasi* and *mokurari*. The entry is to the effect that the land would be held rent-free for the first four years, and that during the next four years the rent would be progressive, namely, four annas, eight annas, twelve annas and seventeen annas in successive years. But there is no statement as to who was to reclaim the jungle. This indicates conclusively that the entry was not intended to be an absolutely full and accurate copy of the original memorandum; it was in essence an abstract of the terms as arranged between the agent of the company and the grantees. If, now, we confine ourselves to the abstract as contained in the book and bear in mind the principle recognised in the cases of *Soora Soondery* v. *Golam Ally* (6), *Sutto Surun* v. *Mohesh* (7), *Dhunput* v. *Gooman* (8), *Huro Prosad Roy Chaudhury* v. *Chundee Charan Boyragee* (9) and *Robert Watson & Co.* v. *Radha Nath Singh* (10), it becomes plain that the tenure was never intended to be enhanceable; and we are fortified in this view when we find further that no attempt has been made to enhance the rent during a period of at least 17 years. The land was obviously let out for purposes of reclamation, to be effected by the lessees at their expense though the lessor also undertook to make a contribution thereto. It was to be held during the first four years without payment of rent. The rent was thereafter to be progressive till the maximum mentioned was reached, and there was no provision for a further rise. The reasonable inference to draw from these circumstances is that the parties intended that when the specified maximum had been reached, there would be no further increase. As was well observed by Mr. Justice Wilson in *Huro Prosad* v. *Chundi Charan* (9), if the contrary view were adopted, the inference would follow that after the maximum had been reached, the lessors might, in the very next year, seek to enhance the rent payable, which could hardly have been the intention of the parties. Whether, therefore, we look to the memorandum produced by the Defendant which contains an express recital that the tenure was *maurasi* and *mokurari* or confine our attention to the entry in the book produced by the company, which though merely an abstract, sets out the material

(6) 15 B. L. R. 126; 19 W. R. 141 (1873).
(7) 12 M. I. A. 263 (1868).
(8) 11 M. I. A. 433 (1867).
(9) I. L. R. 9 Cal. 505 (1883).
(10) 1 C. L. J. 572 (1905).

terms with sufficient fulness, there is no room for doubt that the tenure was intended to be not enhanceable.

The question next arises, whether the manager of the company was competent to grant a *maurasi* and *mokurari* lease of this description. The extent of his authority depends primarily upon a power of attorney, dated the 20th October 1876. It has been strenuously argued before us on behalf of the company that the terms of this power must be strictly construed; and reference has been made in support of this view to the rule recognised in *Bryant* v. *La Banque Du Peuple* (11), *Roy Radhakissen* v. *Nauratan Lal* (12), and *Bindubashini* v. *Giridhari* (13). Our attention has been invited specially to the passage in the power of attorney which authorises the agent to accept *kabuliyats* or counterparts of *maurasi* leases granted by the company to raiyats, and it has been argued that in view of the well-known distinction between *maurasi* and *mokurari* leases, *Munrunjun* v. *Leelanand* (14), the agent must thus be deemed to have been authorised to grant only *maurasi* or hereditary leases and not *mokurari* leases, that is, leases by which rent is fixed in perpetuity. The Appellant has, on the other hand, contended with considerable plausibility that the term "*maurasi*" has been used in the power of attorney, as it is familiarly used in popular language as equivalent to "*maurasi* and *mokurari*", and that the agent was intended to be vested with authority to grant *maurasi* and *mokurari* leases, specially in view of the well-known fact that, for purposes of reclamation, *maurasi* and *mokurari* leases are ordinarily granted to lessees who have to bear the burden, wholly or partially, of the costs of reclamation. Reference has also been made to the terms of a lease granted to the representative of one of the original grantees on the 25th April 1908 after the land had been partitioned amongst the lessees. This lease is described in its commencement as a *maurasi patta*, and the concluding paragraph states that, under the conditions previously mentioned, a *mokurari patta* is granted to the lessees named. An examination of the terms of the lease, however, shows plainly that what is granted is a *maurasi* and *mokurari patta*. It has been argued with some force on behalf of the Appellant that in so far as this company at any rate were concerned, the term "*maurasi*" was used by them as equivalent to "*maurasi* and *mokurari*". In reply it has been argued on behalf of the Respondent that reference cannot rightly be made to a document of subsequent date to explain the terms of the power of attorney which had been executed more than 20 years before: *Bhagwat* v. *Sheo Prosad* (15), *Kamaleshwari* v. *Rahmari* (16). In our opinion, the Appellant need not rely upon the argument mentioned, and it is not material for the purposes of this appeal to hold that the term *maurasi* in the power of attorney was used in a loose or popular sense, as equivalent to *maurasi* and *mokurari*. The decision of the case must depend upon two fundamental questions, namely, first—was the lease granted by the agent within the apparent scope of his authority, and secondly,—was the tenancy created by him ratified by the company?

In so far as the first of these questions is concerned it is plain that the lease granted was within the apparent scope of the

(11) [1893] A. C. 170.
(12) 6 C. L. J. 490 (500) (1907)
(13) 12 C. L. J. 115 (1909).
(14) 3 W. R. 84 (1863).
(15) 18 C. L. J. 277 (303) (1913).
(16) 19 C. L. J. 343 (1913).

authority of the agent. It has been admitted in this Court and the statement is fully borne out by the evidence on the record that Cowasji Edalji was appointed the first agent of the company in this part of the country on the 20th October 1876. He was their chief representative here, and there is no indication whatever that in the management of this property, he acted under the direction of any superior authority. He was in the service of the company for a long series of years and retired in 1903. There is also no suggestion that when this particular grant was made, Cowasji Edalji committed an act of fraud, or that he was, in any way, not entirely faithful in the discharge of his duties, or that he betrayed the trust reposed in him by his employers. The fact cannot be, and has not been, disputed that the agent, at any rate, was under the impression that he had authority to grant a *maurasi mokurari* lease on the terms already described. The grantees also were under the same impression. There is further evidence to show that Cowasji Edalji did, as a matter of fact, grant *maurasi* and *mokurari* leases to other persons in respect of land which had to be reclaimed and brought under cultivation. This was, no doubt, sought to be qualified by one of the witnesses, who suggested that when a *maurasi mokurari* lease was granted by the agent, he obtained permission from the directors in Bombay. But there is nothing to show that the lessees were ever apprised of this fact. It cannot be disputed that every act done by an agent in the course of his employment, on behalf of his principal, and within the apparent scope of his authority, binds the principal, unless the agent is in fact unauthorised to do the particular act, and the person dealing with him has notice that in doing such act he is exceeding his authority: *National B. N. Co.* v. *Wilson* (17), *Duke of Beaufort* v. *Neeld* (18), *Trickett* v. *Tomlinson* (19). The grantees, in the case before us, would be entitled to presume that the agent, who had admittedly authority to grant reclamation leases, had acted with regularity and within the scope of his authority: *Royal British Bank* v. *Turquand* (20), *Agar* v. *Athenaeum Society* (21), *Bargate* v. *Shortridge* (22), *Montreal Co.* v. *Robert* (23). In the circumstances of the present case, it is plain that the act done by the agent was within the apparent scope of his authority, and is binding upon his principals. The first ground upon which the Appellant seeks to hold the company bound by the lease must be maintained.

In so far as the second question is concerned, it has been argued on behalf of the Appellant that the tenancy was ratified by the company, and that as it was ratified, it could be ratified only in its entirety; in other words, that even if the company be assumed to be entitled to repudiate the unauthorised act of their agent, they could not adopt it in part and repudiate it as to the remainder; that is, if they acquiesced in the arrangement made by their agent, they could accept the grantees as tenants only on all the conditions settled by him; the transaction could be confirmed either in its entirety or not at all. This contention is supported by the principle recognised in *Attwood* v. *Small* (24) and *Bristow* v. *Whitmore* (25) and enunciated by Story in his classical treatise on

(17) 5 App. Cas. 176 (209) (1880)
(18) 12 Cl. & F 248 (1845).
(19) 13 C. B N. S. 663 (1863).
(20) 6 E & B. 326 (1855).
(21) 3 C. B. N. S 725 (1858).
(22) 5 H. L. C. 297 (1855).
(23) [1906] A. C. 196.
(24) 6 Cl. and F. 232 (1838).
(25) 9 H. L. C. 391.

Agency (sec. 250) in the following terms: "The principal cannot, on his own mere authority, ratify a transaction in part and repudiate it as to the rest, and hence the general rule is deduced that where a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent." In view of this elementary doctrine, it has not been and it cannot be disputed, on behalf of the company Respondents, that if there was ratification, the transaction must be deemed to have been ratified in its entirety. But it has been argued, and very properly argued, that before the company can be held bound by ratification, they must be proved to have had full knowledge, or, at any rate, means of knowledge of all the essential facts of the transaction into which their agent had entered on their behalf: *Savery* v. *King* (26), *Haseler* v. *Lemoyne* (27), *Gunn* v. *Roberts* (28). In our opinion, there is ample material on the record to show that the company had such means of knowledge in the very book produced by them. The book, evidently kept in the regular course of business, contains a large number of entries similar to the one exhibited in this case. It is in fact a book in which entries were systematically made and a record was kept of transactions relating to settlements of land made by the agent on behalf of the company. An examination of the entries in the book would have disclosed to a director of the company or to any person entitled to exercise powers of supervision over the agent, the nature of the settlement made by him. We hold accordingly that the Company must be deemed to have ratified the particular transaction now before the Court. The second ground, upon which the Appellant seeks to hold the Company bound by the lease, must consequently prevail.

The result is that the appeal must be allowed, the order of the District Judge set aside and the decree of the Court of first instance restored. This order will carry costs both here and in the Court of appeal below. We assess the hearing fee in this Court at three gold mohurs.

Appeal allowed.

(26) 5 H. L. C. 627 (1856).
(27) 5 C. B. N. S. 530 (1858).
(28) L. R. 9 C. P. 331 335) (1874).

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 1169 OF 1913.

FLETCHER, J.
N. R. CHATTERJEA, J.
1913,
28, November.

RADHA KISHEN CHOONI LAL, Plaintiff, Petitioner,
v.
THE EAST INDIAN RAILWAY CO., Defendant, Opposite Party.

Railways Act (IX of 1890), sec. 77—Notice of suit to Agent—Notice to Goods Superintendent if sufficient—Power of Goods Superintendent to make promises binding on Company.

Where the Plaintiff who were consignors of some bags of mustard seed denied that ten bags offered by the Defendant Company were his and the trying Court found that the bags despatched by the Plaintiff were lost or missing:

Held—*That in the circumstances the Plaintiff was bound to serve notice under sec. 77 of the Indian Railways Act upon the Agent of the Defendant Company.*

A notice given to the Goods Superintendent which there was no evidence to show ever reached the Agent was not sufficient.

V. WOODS v. MEHER ALI BEPARI (2), *distinguished and doubted.*

JANAKI DAS v. THE BENGAL-NAGPUR RAILWAY COMPANY (1), EAST INDIAN RAIL-

(1) 16 C. W. N. 356 (1912).
(2) 13 C. W. N. 24 (1908).

WAY CO. v. BABU MADHO LAL (3), *approved.*

The Company cannot be bound by any admission or statement by the Goods Superintendent such as is implied in a promise made before the suit to pay a liquidated sum to the Plaintiff for the value of the missing bags.

This was a Rule granted on the 15th August 1913 against the judgment of Babu Tarak Nath Dutt, Small Cause Court Judge at Howrah, dated 31st July 1913, in a suit for recovery of money (Rs. 146-4) due for the value of undelivered goods, *e.g.*, 10 bags of mustard seeds out of 175 bags consigned. The Small Cause Court Judge had dismissed the suit. Hence this Rule obtained by the Plaintiff.

Babu Probodh Chandra Roy for the Petitioner.

Mr. B. C. Mitter, Babus Mohendra Nath Roy and *Ambicapada Chowdhury* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This Rule was obtained by the Plaintiff in a suit in the Court of Small Causes at Howrah calling upon the Opposite Party, the East Indian Railway Co., to show cause why the decree of the Court below should not be set aside as prayed in the petition. The suit was brought by the Plaintiff against the East Indian Railway Co. to recover damages for not having delivered ten bags of mustard seed which formed part of a parcel that had been consigned to Howrah on account of the Plaintiff. The case set up, as far as we have been told, was that the East Indian Railway Co. offered to the Plaintiff ten bags which they believed formed a portion of the consignment of the Plaintiff's goods but that the Plaintiff refused to take delivery thereof stating that they were not his goods. The case came on for trial before the learned Judge and the case put forward by the Plaintiff was that these goods were not his and, in the evidence before the Judge, he came to the conclusion that the ten bags were missing or lost. If there is evidence to justify that finding, we cannot interfere with it. We have heard from the learned Vakil for the Applicant what can be said against that and in our opinion, there was evidence which justified the learned Sub-Judge in coming to the conclusion that the goods were lost or missing. If the goods were lost or missing, then sec. 77 of the Indian Railways Act (IX of 1890) would apply and the Plaintiff was bound to serve notice as provided by that section and the notice that the statute requires is notice on the Railway Administration or, in the case of a Railway administered by a Railway Company, on the Agent in India of the Company. The Agent in India does not mean any person employed by the Railway Company; it means the particular person who holds the title and office of the Agent of the Railway Company in India. There is no doubt that in this country everybody knows who the Agent is of such a big Railway Company as the East Indian Railway Company which is incorporated in England. In the present case, the notice—according to the learned Sub-Judge and that finding is not quarrelled with—was served on the Goods Superintendent, a person holding a comparatively subordinate position and it was also found as a fact that there was no evidence to show that the notice ever reached the Agent of the Company. On those findings, in my opinion, the decision in the case of *Janaki Das* v. *The Bengal-Nagpur Railway Company* (1) is conclusive upon this matter. That is a decision

(3) 17 C. W. N. 1134 (1913).

(1) 16 C. W. N. 586 (1912).

of the learned Chief Justice and my learned brother who is now sitting with me. It seems to me impossible to distinguish this case from the part of that case which had reference to the two lost bags. Then, it is said that the notice was properly served on the strength of a decision in *V. Woods* v. *Meher Ali Bepari* (2), which is a decision of Mr. Justice Holmwood and Mr. Justice Sharfuddin. Speaking for myself, I prefer the decision of Mr. Justice Harington and Mr. Justice Carnduff in the case of *East Indian Railway Co.* v. *Babu Madho Lal* (3), and I may point out in passing that the decision of Mr. Justice Holmwood and Mr. Justice Sharfuddin in *V. Woods* v. *Meher Ali Bepari* (2) is not consistent with the decision of the learned Chief Justice and my learned brother who is now sitting with me in the case in *Janaki Das* v. *The Bengal-Nagpur Railway Company* (1). But even if we are bound by the decision in *V. Woods* v. *Meher Ali Bepari* (2), the facts in this case are not sufficient to bring it within the decision of Mr. Justice Holmwood and Mr. Justice Sharfuddin, because the learned Judges in that case came to the conclusion that the notice which had been served upon the Traffic Manager did, in fact, find its way into the hands of the Agent. The learned Sub-Judge in this case has found that there is nothing to show that the notice served on the Goods Superintendent ever found its way into the hands of the Agent.

Then, there was another point that was faintly suggested, namely, that the Goods Superintendent promised to pay a liquidated sum to the Applicant as the value of the ten bags. There is nothing to show that the Goods Superintendent is a proper person to bind the East Indian Railway Company with such a promise, nor is it suggested that it ever came to the knowledge of the Agent. It seems to me quite impossible to hold that the East Indian Railway Company should be bound by an admission or statement made by any person employed by them. I am of opinion that, on the findings made by the learned Judge of the Court below, the present Rule must fail. The Rule is accordingly discharged with costs, one gold mohur.

N. R. CHATTERJEA, J.—I agree.

Rule discharged.

(1) 16 C. W. N. 356 (1912).
(2) 13 C. W. N. 24 (1908).
(3) 17 C. W. N. 1184 (1913).

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 556 OF 1914.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1914,
19, June.

HURCHAND RAY GOBOURDHON DAS, Petitioner,
v.
THE BENGAL-NAGPUR RAILWAY CO., Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 3, r. 1 — Recognised agent, if has right of audience.

A recognised agent as such has no right of audience.

This was a Rule granted on the 15th of May 1914, against an order of Babu Rajani Kanta Chatterjee, Small Cause Court Judge at Sealdah, dated the 12th of May 1914.

The Petitioner instituted a suit, in the Court of Small Causes at Sealdah, for the recovery of Rs. 100, being the value of the goods entrusted to the Opposite Party for carriage from Chajaria station on the Railway line of the Opposite Party to Shalimar and for delivery there to Petitioner.

The Plaintiff was represented in the suit by his authorised agent Babu Satish Chandra Singh who did not engage any pleader for the Plaintiff. The

THE

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Contents.

NOTES.

Criminal Sessions.

The last Calcutta Criminal Sessions for the present year will commence its sittings from Wednesday next, Mr. Justice Teunon presiding.

Barristers in Khaki.

We note that the Judges in England are allowing barristers who are under military duties or training to appear before them without wig and gown. Some of our English legal contemporaries do not seem to approve of the practice evidently for the reason that an unrobed gentleman with the suggestion that he has volunteered his services for the country will carry with him the common jury against his robed brother-in-law. But the remedy suggested by our contemporary that military members of the Bar should be required to wear gown over their *khaki* is open to the same objection. So the most sensible course would seem to be to allow all to appear in ordinary gentlemen's clothes in Court.

Effect of the war on Cause-lists in English Courts.

The effect of war on the King's Bench Division of the High Court of England has been very conspicuous. For the term commencing in October only nine actions have been entered in the Special Jury List, seventeen in the Common Jury List and ten in the Non-Jury List. The list of the Appeal Court, made up since early in August last, contains about the normal number of appeals, because the cases from which appeals have been preferred were decided long before the war. The same may be said of the appeals filed in the House of Lords from all the Superior Courts in Great Britain and their number is somewhat higher than usual. The appeals to the Judicial Committee similarly have not been materially affected. There are 26 appeals in the list, out of which 16 are from India, four from Canada, two from Australia and one each from Jersey, Ceylon, South Africa, South Nigeria.

Civilian Population and Home defence.

The right and its limitations of the civilian population to take up arms against an army of occupation is a vexed question. The rules of the Hague Convention may be said to sanction, to a certain extent, the devastation carried on by the German Army in Belgium, though not certainly the personal outrages. We agree with our contemporary of the English Law Journal that the rules of the Hague Convention are far from satisfactory in this respect. In ancient India a much higher code of honour prevailed amongst combatants. The modern rights and limitations of the civilian population regarding "home defence" is thus summed up by our contemporary :—

"There is considerable uncertainty among lawyers, as well as laymen, as to the extent of the right of the population of an invaded country to rise *en masse* against the enemy. The Hague Convention of the Laws of War on Land contains a rule that 'The population of an unoccupied territory which, on the approach of an enemy, takes up arms spontaneously to resist the invading force, without having had time to organise itself conformably to the article about the organisation of volunteer and militia corps, will be treated as belligerent if it carries arms openly and respects the laws and customs of war.' The important con-

dition about carrying arms openly was added to the rule in 1907, and the effect of it is that the population will only have a legitimate belligerent character if it can be recognised by the invader as an armed force. It need not, indeed, comply with the requirements that are established for volunteer corps, *i.e.*, have at its head a person responsible for those under him, or wear an irremovable and characteristic badge of a kind to be recognised at a distance; but, on the other hand, it will not be protected if it attacks the invaders from the shelter of houses and buildings when once the village or town has been occupied. It may meet the foe in the open with whatever arms it can muster. But if the question is asked, may an Englishman defend his home? and it is meant by that, may any individual try to prevent the invader entering his house? The answer of Conventional International law is that he does so at the peril of seeing his family made homeless, and possibly maltreated, and of being himself hanged as an illegitimate combatant. The British delegate at the Hague Conference of 1899 proposed an addition to the rules of regular warfare that nothing shall be considered as tending to diminish or suppress the right which belongs to the population of an invaded country to patriotically oppose the most energetic resistance to their invaders by every legitimate means. This provision, if carried, would have given larger rights of resistance to unorganised masses; but the Conference rejected it, and substituted in its place one of those fine-sounding but little-meaning resolutions that unforeseen cases were to be placed 'under the safeguard of the law of nations, the law of humanity, and the requirements of the public conscience.' The tragedy of Belgium is the poignant commentary on the practical effect of this general *voeu*, the value of which may, it is hoped, never have to be tested on our own shores."

Correspondence.

ATTORNEYS' LIBRARY,
HIGH COURT, CALCUTTA.
Dated the 26th November 1914.

FROM
F M LESLIE, ESQ.,
Hony. Secy, Incorporated Law Society of Calcutta,

--
THE EDITOR,
Calcutta Weekly Notes.

DEAR SIR,

I enclose copy of a letter received by me from the Registrar of the High Court last evening with reference to the Prospective List. May I ask you please to give it prominence in your next issue? I feel sure that the members of the profession need only to have their attention called to the matter for the evil complained of to be remedied. It is not always easy to forget the rules that have guided one for many years and to adopt new rules in their place. I think that this is really the cause of the whole trouble and that when the profession realises the difference between the new rule and the old such complaints will disappear. I trust the Registrar's letter will have the effect of calling the attention of the members of the profession to the rules concerning the Prospective Lists and that they will give the Court every assistance in the matter to which the Registrar's letter refers.

Yours faithfully,
F. M. LESLIE,
Hony. Secy.

FROM
J. H. HECHLE, ESQ.,
Registrar, High Court, Original Side,
TO
F. M. LESLIE, ESQ.,
Honorary Secretary to the Incorporated Law Society of Calcutta.
Present:
The Hon'ble Sir Lawrence Hugh Jenkins, Kt., K. C. I. E., the Chief Justice of Bengal.

SIR,

I am directed to draw your special attention to the notice which appeared in the Cause List on Saturday last under the Prospective Lists, which notice is to the following effect:—

"It is desired to bring to the attention of the profession that a list of suits, which have not appeared in the Prospective List within 6 months from the date of institution, is now being prepared in the office, and notices under Ch. X, r. 36 of the Original Side Rules will be issued unless in the meantime requisitions have been received under Rule 7."

I have been informed that some of the profession are doubtful whether the Rules in Ch. X apply to suits which were filed before 15th April last when the New Rules came into force, and which were in the Remanet List on that date.

I find that the Officiating Registrar in his letter to you of the 29th May last referred to this same point (see the last paragraph of his letter), and he asked you to convey to your members the information that such cases could be and were being so transferred.

I am to point out that under the New Rules it is only from the Prospective Lists that suits required for the Peremptory Lists of Defended Suits are to be taken, the policy of the New Rules being to place the onus of saying when a suit is ripe for hearing upon the parties who best know when the suit is ready for trial.

Up to the present only a small percentage of the cases on the old Remanet List have been transferred to the Prospective Lists, with the result that, if the New Rules are to be followed, there may in a short time be an insufficiency of cases to keep 3 Courts going, although in fact there may be many suits which are ready to be heard.

I am to ask that you will be good enough to bring this matter to the attention of the profession with a view to their sending in requisitions under Chapter X, rule 7, in all cases which are ripe for hearing as soon as possible.

I have the honour to be,
SIR,
Your most obedient servant,
J. H. HECHLE,
Registrar.

Notes of Cases

ENGLISH LAW COURTS.

THE PRIZE COURT—Before the RIGHT HON'BLE SIR SAMUEL EVANS, PRESIDENT. **"The Tommi," "The Rothersand."** October 15th 1914.

Transfer of German vessels made when war was imminent held invalid.

Two vessels, which belonged to a German Company, were seized in British ports on the outbreak of hostilities. An English Company wrote to the German company on July 31st, suggesting that if the vessels should be in England in case of war, it would be advisable that they should purchase them in order to prevent their capture. On August 1st war began between Germany and Russia. On the same day the German company sold the vessels to the English company. War between Germany and Great Britain was declared on August 4th. The question raised was whether the transfer was such as to defeat the right of the belligerents. The learned Judge held that the transfer was not valid. He observed as follows:—

"There are three heads under which the case can be considered. First, whatever may be the result properly to be attributed to this alleged transfer, it is said the vessel was sailing under the German flag on August 5, and that therefore the German flag proves her nationality, and she must therefore be taken to be German and subject to seizure by this country on August 5. It is perfectly clear that if a ship does sail under a particular flag, unless there are very special reasons, she enjoys the protection of the country whose flag she flies, and she is regarded as belonging to the State whose flag she carries. Mr. Laing said there was a distinction to draw in considering this part of the case between a capture at sea and seizure in port It does not matter in the slightest degree whether the flag was actually flying and hoisted at the mast. The question is what flag she was entitled to fly, and in my view there is no distinction upon this part of the case between a ship captured at sea and a ship seized in port. The law, as it was understood, which says that the nationality of a ship depends upon the flag was adopted in the Declaration of London by the parties thereto, as is shown by Article 57, to which there is an interesting note written by M. Renaud. The flag which this vessel was entitled to fly at the time of her seizure was the German flag, and she could not at that time, if she ever could during the war, supposing the transfer was valid, have the right to fly the British flag. Therefore if there were no other point in the case, I think the fact that the vessel was flying the German flag is enough to entitle her to be regarded as the subject of capture.

The second question is whether this transfer was valid, and I have come to the conclusion, clearly, for the purpose of the Prize Court, that this transfer was not a valid transfer at all. If it were necessary—I don't think it is—if the transfer was incomplete, that is sufficient answer; but if it was necessary I could not bring myself to believe it was a *bona fide* transfer of the ownership. It was hardly more than this. "We understand you over there, and you understand us over here; our companies are mutually connected. We in Germany own nine-tenths of the shares in the British company; if war breaks out whoever the belligerent is, let this ship be called a British ship." I think that is the real substance of the transaction. Apart from that, much more is needed to transfer a vessel in transit when war has been declared or even when war is imminent than was done in this particular case.

If I have stated the correct principles to apply I need not go into the details of the case to point out that nothing was arranged as to when the purchase money was to be paid, as to when the completion was to take place, or that it is not shown that any satisfactory arrangement was made by the British company that they and not the person who is said to have bought the vessels (Mr. Gunther) should become the purchasers. Apart from the Declaration of London (Articles 55 and 56), and whatever alteration that may make in the law, it cannot be said that the artificial periods of time for the transfer of vessels agreed upon by the various nations can be found in any decision of any particular Prize Court belonging to any country. They are convenient, but I refer to Articles 55 and 56 to show (1) that the basis of the whole thing must be that the transfer was not made to avoid the consequences to which the enemy vessel supposed to be transferred might be exposed by the action of any belligerent, and (2) that in any event, even after a lapse of time like 30 days, the transaction must have been completed, not merely by letters or telegrams passing, but by the execution of the formal documents necessary to complete the title. In this case there is an absence of any such documents. I have come to the conclusion, therefore, without any doubt that this alleged transfer was not valid, and that this ship remains for all purposes connected with the Prize Court a German ship."

Mr Aspinall, K. C., and Mr. Rayner Goddard for Crown in case of *Tommi*.

Mr. Bateson, K C, and Mr. Goddard in case of *Rothersand*.

Mr. Laing, K. C, and Mr Arthur Pritchard for Sugar Fodder Co, in both cases.

B D.

COURT OF APPEAL—Before LORDS JUSTICES BUCKLEY, PHILLIMORE and PICKFORD. **Dobson v. Horsley and another.** October 14th 1914

Claims of a tenant's child for injuries caused by defective railings against the landlord, when maintainable.

This was an appeal by way of new trial from a decision of Ridley, J., with a common jury.

The Plaintiff, an infant, sued for damages for injuries suffered by him. The Defendants were owners of a house, and one of its rooms on the groundfloor was let by them to the Plaintiff's father. There were some railings outside the house, through which the Plaintiff fell down. The Plaintiff complained that the Defendants negli-

gently allowed the railings to remain in an improper state of repair.

The jury found that the railings were in a defective condition at the time of the letting, but they differed as to wheher the Defendants' attention had been drawn to the defect. The Court below dismissed the claim.

On appeal it was contended that the Defendants were guilty of negligence and that the defective railings constituted a danger and a nuisance to persons lawfully using the premises. The Court dismissed the appeal.

LORD JUSTICE BUCKLEY said that in CAVALIER v POPE, (1906) A. C. 428, the owner of a dilapidated house contracted with his tenant to repair it, but failed to do so. The tenant's wife, who lived in the house and was well aware of the danger, was injured by an accident caused by the want of repair. The House of Lords held that the wife, being a stranger to the contract, had no claim for damages against the owner. Here the defect was not on the demised premises. The flight of steps which had the defective railings was not demised, and the landlord retained control over it. It was contended for the Plaintiff that that made a difference, and reliance was laid on MILLER v HANCOCK, (1893) 2 Q. B. 177. There the Defendant was the owner of a building in the City, the different floors of which were let by him separately as chambers or offices, the staircase by which access to them was obtained remaining in the possession and control of the Defendant. The Plaintiff, who had in the course of business called on the tenants of one of the floors, fell, while coming down the staircase, through the worn and defective condition of one of the stairs, and suffered personal injuries. It was held that there was by necessary implication an agreement by the Defendant with his tenants to keep the staircase in repair, and, as the Defendant must have known and contemplated that it would be used by persons having business with them, there was a duty on his part towards such persons to keep it in a reasonably safe condition. That was really a case of laying a trap. It was distinguishable from the more recent cases of HUGGETT v. MIERS, (1908) 2 K. B. 278, and LUCY v. BAWDEN, (1914) 2 K. B. 318, which were not in any way cases of laying a trap, the last mentioned case being very similar to the present. He desired to follow the authorities, and he did not think that this case was concluded by MILLER v. HANCOCK, (1893) 2 Q. B. 177 In his opinion the liability of the Defendant could not be enlarged because the person injured was a young child.

Appeal dismissed with costs.

Mr. Eric Dunbar and Mr A. B. Ashby for Plaintiff.

Sir Frederick Low, K. C., and Mr. R. O. B. Lane for Defendants.

B. D

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
27, October.

THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY AND PATRICK ROBERT CADELL, MUNICIPAL COMMISSIONER OF THE CITY, Appellants,
v.
THE GREAT INDIAN PENINSULAR RAILWAY COMPANY, Respondents.

Can a Railway Company construct a railway across a public road without the permission of the Municipality?

This was a petition for special leave to appeal against a judgment of the Bombay High Court dated 5th September 1913.

The Petitioners instituted a suit praying for a declaration that the Respondents were not entitled to take or retain possession of a certain road without the permission of the Plaintiff, and for an order against the Respondents to remove rails, etc., from the road. The Plaintiff's case was that under sec. 289 of the Bombay Municipal Act (Bombay Act, III of 1888), all public streets within the City of Bombay were vested in the Petitioners, and that under sec. 293 of that Act, no tramway or railway or the like could be laid upon any public street without the permission of the Plaintiff.

The Defendants denied the Plaintiff's claim and pleaded that under sec. 7 of the Indian Railways Act (IX of 1890), they had power to construct lines of railway across the road in question, without obtaining the permission of the Plaintiff.

The Bombay High Court on its Original Side allowed the Plaintiff's claim with costs and damages, holding that the Indian Railways Act did not authorise the Defendants to construct a railway on the road in question without the permission of the Plaintiff, because the road was immoveable property which did not belong to the Respondent and to which the provisions of the Land Acquisition Act (I of 1894) were applicable.

The Appellate Court set aside that decision.

It upheld the contention of the Defendants, and construed sec. 7 of the Indian Railways Act upon the analogy of the provisions of the English Railway Clauses Consolidation Act, 1845.

Mr. G. R. Lowndes, for the Petitioners, submitted that the English Act and cases decided thereunder had no application to the present case and that the appeal raised an important question of law of general interest.

Their Lordships granted the petition on the usual terms.

Solicitors: Cameron Kemm & Co., for Appellants.

B. D.

Special leave granted.

Vakil who appeared for the Defendant Opposite Party at the trial took a preliminary objection that the authorised agent had no power to plead and examine witnesses on behalf of the Plaintiff. The objection was upheld by the Small Cause Court, the Judge being of opinion that though under Or. III, r. 1, a recognised agent can indeed appear, act and apply on behalf of the Plaintiff or Defendant by whom he has been authorised to do such things, "the law does not give him the power to plead on behalf of his principal."

The matter was brought before the High Court by an application for revision on behalf of the Plaintiff.

Dr. Rash Behary Ghosh, Babus Biraj Mohan Majumdar and *Probodh Chandra Roy* for the Petitioner.

Babu Kali Mohan Sen for the Opposite Party.

Babus Ram Charan Mitra and *Trailokhya Nath Ghosh* for the Vakils' Association.

The JUDGMENT OF THE COURT was as follows :—

Recognised agent as such has no right of audience.

We must, therefore, discharge the Rule with costs (hearing-fee one gold mohur) payable to the Opposite Party, the Bengal-Nagpur Railway Company.

Rule discharged.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD DUNEDIN.
LORD ATKINSON.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
Heard, 23 and 24, June.
Judgment, 21, October.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Appellant,
v.
SRI RAJA KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA, Respondent,
AND
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Appellant,
v.
SRI BIRBAR NARAYAN CHANDRA DHIR NARENDRA, Respondent.

Chaukidari chakran lands resumption by Government of— What chaukidari lands are resumable —Onus on Government to shew that land was set apart under its direction for grant to chaukidars and not taken into account in assessing revenue—Village Chaukidari Act (VI, B. C., of 1870)—"Assigned," "appropriated," meaning of—Reg. I of 1793, sec. 8, cl. 4—Reg. VII of 1793, sec 41.

As a zamindar as such has primâ facie *title to the full enjoyment of every parcel of land within the zamindari for which he pays revenue to Government, it rests on the Government to show that the settlement with the zamindar was subject to reservations in respect of any land which gave Government the power of resuming and assessing it.*

The power of resumption had been reserved under cl. 4 of sec. 8, Reg. I of 1793, and sec. 41 of Reg. VIII of 1793, in respect of such chaukidari chakran lands only as had been set apart by the zamindars with the permission of the Government and under its authority, and which although included in the mahal and annexed to the malguzari lands were not taken into consideration for the assessment of revenue.

Held—*That the Government had no*

authority to resume chaukidari chakran lands within the zamindaries of Sukinda and Madhupur in Orissa when it failed to show that any parcel of land within the zamindaries was not taken into account in fixing the revenue payable for the zamindaries.

That the zamindars entertained the services of chaukidars for whose maintenance they allotted from time to time certain lands of their own free will. They were under no obligation to make such grants, when their only obligation under the terms of their sanads *was to maintain peace and order within their zamindaries; and the mere fact that some appointments were made with the approval of a Government Officer cannot alter the nature of the grants and make them resumeable by Government.*

The word "assigned" in the definition section of Act VI of 1870 (B.C.) means lands assigned by Government or appropriated under its authority or with its permission.

These were consolidated appeals from two judgments and decrees, both dated the 23rd March 1910, of the High Court of Judicature at Fort William in Bengal, which reversed the judgment and decree of the Court of the Subordinate Judge of Cuttack in two separate suits. The facts of the case sufficiently appear from their Lordships' judgment. By orders dated the 1st August 1901 and the 28th November 1902, the Collector transferred the lands in suit to the Plaintiffs and subjected them to an assessment under the Village Chaukidari Act, 1870. The Plaintiffs sued in 1906 for a declaration that the lands were not "chaukidari chakran lands" within the meaning of the said Act. Two questions arose, namely, first, whether the suit was barred under Art. 14, Sch. 2 of the Limitation Act, 1877; second, whether the lands were "chaukidari chakran lands" within the said Act.

The Court of the said Subordinate Judge delivered judgments in suit No. 148 of 1904 and suit No. 66 of 1906, on the 11th September 1906 and the 27th May 1907, respectively.

In the first, the Subordinate Judge held that the Plaintiff's suit was barred by limitation under Article 14, Schedule II of the Limitation Act, 1877. As to the main issue, he observed as follows :—

"After the conquest of the province, the Commissioners, then appointed to bring about a settlement in it, granted a *sanad* to the then Raja of Killa Madhupur, entitling the Raja to hold the Killa at a revenue fixed in perpetuity. There were no doubt then chaukidars in the villages covered by the Killa who had their jagir lands. To insure proper watch in the villages and to prevent crimes in them are no doubt necessary from the beginning in a good Government, and it cannot be inferred that the Commissioners neglecting the welfare of the village community and raiyats generally made the settlement of all lands including the chaukidari jagirs with the Raja. Had it been a fact, the Raja would have never allowed the chaukidars to do police duties, and also to act as police subordinates. Thus considering everything, I hold that the lands in question are chaukidari chakran lands falling within the purview of Act VI of 1870 (B.C.), and that this Act and the proceedings taken under it apply to them. The Collector, under sec. 50 of the Act, transferred the lands to the Plaintiff, assessing the amount of half the rent chargeable upon him. I have already said that this transfer can be lawfully made without having recourse to the provisions of secs. 58 to 61 of the Act."

In the second suit, the Subordinate

Judge held that the Plaintiff's estate was a permanently settled estate, and said as follows :—

"No doubt the rent payable by the Plaintiff is fixed in perpetuity, but that is no bar to the extension of the Chaukidari Act to his Killa. Admittedly he is now paying Road and Public Works cesses, and his annual rental has already been interfered with, so that the fixity of his rent is, I think, no ground to hold that the Chaukidari Act could not be extended to his zamindari.

"It was also vehemently contended that the Plaintiff's estate was never settled, and hence it cannot be looked upon as permanently settled. No doubt his predecessor obtained a *sanad* fixing his rent in perpetuity, but I presume, this rent was settled by the Mahratta Government, and the British Government accepted it as settled by its predecessor. I am thus of opinion that the Plaintiff's Killa is a permanently settled estate and not merely one with its rent fixed in perpetuity.

"The Regulations and Acts enforceable to permanently settled estates in Bengal were also applicable to the Plaintiff's estate, and I find that the Government was competent to extend the Chaukidari Act to Sukinda."

In the result the Court of the said Subordinate Judge made a decree in each suit, dismissing the Plaintiff's claim with costs. Against the said decrees both Plaintiffs appealed to the High Court of Judicature at Fort William in Bengal. Both appeals were heard by Mr. Justice Woodroffe and Mr. Justice Caspersz who delivered separate judgments on the 23rd March 1910, in each appeal. The learned Judges concurred in holding that the suits were not barred by limitation, and that the lands in dispute were not *chaukidari chakran* lands within the meaning of the said Act.

In the course of his judgment WOODROFFE, J., said as follows :—

"Under sec. 41, Regulation VIII of 1793, chakran lands were declared not meant to be included in the exception contained in sec. 36. The whole of these lands were annexed to the malguzari lands, and declared responsible for the public revenue assessed on the zamindaries in which they were included. These chakran lands were, however, not assessed with revenue and were not taken into account in assessing the revenue on the estate of which they formed a part. That being so, the introduction of the Chaukidari Chakran Act did not, as regards lands so settled, affect in any way the terms of the original settlement This is not, however, the case here. Prior to the *sanad* granted by the British Government the Plaintiff held his estate under the Mahrattas at a fixed rent. There was no settlement of the estate by that Government, which thereby merely confirmed, by sec. 33, Regulation XII of 1805, the *sanads* granted by the British Commissioners, which themselves confirmed the terms on which the estate was held under Mahrattas. In any case there is nothing to show that the chaukidari chakran lands were excluded from assessment when the estate was settled or confirmed by the British Commissioners. The Plaintiff paid a fixed sum for the whole estate including the chaukidari chakran lands, if there were any. And so we find Mr. McNeele stating in his report in the Village Watch (page 62) 'chaukidari jagirs exist in the dependant *peshkashi* mahals, but they have never been measured or recorded. The Government has probably no right to resume them, as their value was certainly in no way taken into

account in fixing the quit rents of the mahals.' Now when we consider the definition given in the Act of chaukidari chakran lands it appears to me to be clear that such chaukidari jagirs, if there be any, do not come within the definition of Act VI of 1870."

And CASPERSZ, J., in the course of his judgment remarked as follows :—

"There is no precise evidence directed to the position of the Sukinda chaukidars in the year 1870, but from what I have already observed, it admits of very little doubt that the Plaintiff and the police all along exercised a dual control over the village watchmen. The semi-military *paiks* without service-lands were gradually superseded by the chaukidars, who enjoyed jagirs, and I believe, that from the year 1879 the *paiks* had no connection with the police, as deposed to by witness Kali Charan Prusti. It is evident, and the fact has not been controverted, that the Plaintiff revised the jagirs and allotted lands to the new chaukidars required from time to time as the jungly parts of the Killa came under cultivation and new hamlets were established. The material portions of the evidence have been placed before us, and I am satisfied that the greater part of the lands in suit consisted of new jagirs, as to which there cannot possibly be any doubt that they were not assigned, that is, by the State, for the maintenance of the village watchmen in the year 1805 It is necessary to go back to that year, because the Plaintiff's Killa was permanently settled by sec. 33 of Regulation XII of 1805, and no other settlement was, or could have been, made subsequently. It is conceivable that if a commission had been appointed, under secs. 58-61 of the Chaukidari Act, the original jagirs might have been traced, but that obvious procedure was not adopted by the authorities. The result is that all the lands dealt with by the Collector must be deemed to be in one category and not to satisfy the definition of chaukidari chakran lands. The presumption arising from the registration of the watchmen under Regulation XX of 1817 has been amply rebutted by the evidence on the side of the Plaintiff. The watchmen registered by the police might still have been in the enjoyment of private chakran lands. There was no register of *paiks* : none was required under Regulation XX of 1817.

"The real issue in this dispute has been obscured by the Plaintiff's insistence on his superior position under the terms of his supposed *kaulnama*, but on the substantial question, whether the lands are chaukidari chakran or not, I have no hesitation in finding in his favour."

In the result the High Court allowed the appeals, set aside the decrees of the Subordinate Judge, and made a decree in each suit allowing the Plaintiff's claim with costs: Hence these appeals.

Sir Erle Richards, K. C., and *Mr. A. M. Dunne* for the Appellant submitted that the High Court erred in holding that the lands were not chaukidari chakran lands. In the definition of the words chaukidari chakran lands in sec. 1 of the Act, "assigned" meant an assignment made either by the Government or by the zamindar to the chaukidar or police-officer for his maintenance. There was no warrant to put a limitation on the word and to hold, as the High Court had done, that the assignment contemplated by the section meant an assignment by the Government only. The words ought to be construed in their plain meaning; secs. 48 and 49 also supported the view that all lands whether assigned by the Government or by the zamindar were dealt with by the Act. The general scheme of the Act was to put an end to

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jagirs assigned for the maintenance of police-officers. Further, the words "otherwise than under a temporary settlement" in sec. 1 meant otherwise than under a temporary arrangement whether made by the Government or zamindar. The word "settlement" was not used in its technical sense. A settlement may be made by a zamindar as well as by the Government. The High Court was wrong in holding that no lands could be chaukidari chakran lands unless the Government had the right to resume them, and to assess them with revenue. It was not a case of resumption, nor was the fixing of the chaukidari dues an assessment of land revenue. The lands were assessed with the chaukidari cess payable to the chaukidari fund of the village. It was not revenue, but it was a cess similar to the road-cess which was paid by the Plaintiffs. Chaukidars were ancient institutions of the Plaintiff's estates, and their duties were to keep watch and to aid the police. The chaukidars held grants of land out of the said estate as jagirs in remuneration for their services. There was evidence that the chaukidars were appointed with the approval of the District Superintendent of Police and the Magistrate of the District, and that they performed their duties under the supervision and direction of the said officers and were subject to their authority. The register of chaukidars kept by the Plaintiffs from 1849 to 1869 clearly proved that. As the result of orders made by the Collector transferring the lands in suit to the Plaintiffs, the lands were freed and the Plaintiffs got them from their chaukidars. They could not be allowed to object to pay the chaukidari cess to the village fund. Reference was made to Regulation XII of 1805, Regulation XIII of 1805 and Regulation XX of 1817, Act 9 of 1880 (B.C.).

Mr. L. DeGruyther, K.C., and *Mr. Bhugwandin Dubé* for the Respondent submitted that the decision of the High Court was right. The Plaintiffs were zamindars who held their estates at a fixed *jama* in perpetuity. In assessing revenue on the Plaintiffs' estates the Government took into consideration the whole area of their estates including the lands in dispute. The onus lay on the Defendant to show that the Government made any reservations in respect of any lands with the Plaintiffs' ancestors at the time of granting *sanad*. Mr. McNeele's Report of the Village Watch, 1866, showed that the lands held by the Plaintiffs' chaukidars were taken into consideration in fixing the Government revenue and that they were not excluded from Government revenue. The Government had no right to resume any portion of the estates of the Plaintiffs. The word "assigned" in sec. 1 of the Act meant assigned by the Government, and not by the zamindar. Also, the words "temporary settlement" in that section meant a settlement by the Government, and not by the zamindar. The provisions of the Act, as well as the form of the "transferring order" in Schedule C of the Act showed that the Collector was entitled to transfer those lands only, which had been assigned by the Government for the maintenance of the chaukidars and in respect of which the Government had reserved the right to resume. That this was the view taken by the Government itself was apparent from the Government Resolution, dated the 9th February 1897 (quoted in their Lordships' judgment). The lands in dispute were already the property of the Plaintiffs, and there was no possible meaning in the Collector's transferring the same lands to the Plaintiffs by the transferring order made under the Act. The "transferring order" was a sort of a *sanad* to the zamindar to hold the lands transferred thereby in

perpetuity subject to the assessment. That was unnecessary in the case of the Plaintiffs. The right to resume was under Regulation I of 1793, sec. 8, clause 4, and the method of resumption was the one provided by the Act of 1870. Those were inapplicable to the Plaintiffs. The *sanads* granted to the Plaintiffs did not impose any police duty upon them. They employed the village chaukidars for performing various services in the village, but the evidence established that the chaukidars were the private servants of the Plaintiffs, and that the Plaintiffs allotted to them lands for their maintenance of their own free will. The Plaintiffs also changed the lands so granted from time to time. There was no evidence to show that the chaukidars had any right against the Plaintiffs who were free to deal with the lands as they liked. The Government has the right of imposing a police-rate, but the orders made against the Plaintiffs could not be supported under the provisions of the Village Chaukidari Act, 1870. Reference was made to *Raja Lelalund Sing Bahadoor* v. *The Bengal Government* (3), Harrington's Analysis of Bengal Regulations, Vol. II, pp. 235, 236, Toynbee's History of Orissa, p. 165.

Sir Erle Richards replied.

[Their Lordships announced on the 4th August 1914 that they would advise His Majesty to dismiss the appeals, and that they would deliver their reasons later on.]

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The Plaintiffs in the two actions which have given rise to the present appeals are respectively the zamindars of Sukinda and Madhupur in the province of Orissa, and the question for determination relates to certain lands included in their estates in respect of which the Defendant, the Secretary of State for India in Council, claims to exercise the right of resumption and assessment by virtue of the provisions of Act VI of 1870 of the Bengal Council.

The facts of the two cases are set out with great clearness in the judgments of the High Court of Bengal, and do not, therefore, require a detailed statement. Their Lordships propose to give only a brief sketch of the circumstances which have culminated in the present litigation.

It appears that the predecessors of the two Plaintiffs had been in possession of their estates from a time long anterior to the establishment of British power in that part of the country. The origin of their title under British rule is intimately connected with the political history of the province. Orissa consists of three well-defined tracts: in the middle lies a level open country inhabited by a settled population. Here the Moguls in the reign of Akbar introduced their revenue system with its regular assessment of public dues. These territories were consequently designated the *Mogulbandi*, which is defined in Regulation XII of 1805 as being that part of the District of the Zillah of Cuttack in which, according to established usage, as in Bengal, the land itself is responsible for the payment of the public revenue, and in which every landholder holds his land subject to the conditions of that usage."

The wild and hilly tract on the west, and the low marshy lands along the sea-shore to the east were held by a number of chiefs who, under the designation of *rajas*, *zamindars*, and *khandaits*, were allowed to exercise a feudal sway in their respective jagirs on payment of a fixed tribute to the Imperial Government. These outlying parts of the province were usually called the *Rajwara*.

(3) 6 M. I. A. 106, 107, 127 (

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The zamindaries of Sukinda and Madhupur lay within the *Rajwara* and outside the *Mogulbandi* territories.

Shortly before the acquisition of the Dewanny by the East India Company, the Mahrattas had obtained possession of a large tract to the south of the Suvarnarekha river, including the *Rajwara*, and thus, when the Company obtained the virtual government of Bengal, Bihar and Orissa, under Shah Allam's grant, the *de facto* British possession of the latter province did not extend beyond the Suvarnarekha to the south of Midnapore.

In 1803 the Mahratta Raghoji Bhonslay, who held Southern Orissa, came into collision with the forces of the East India Company, and in the October of that year the country south of the Suvarnarekha river was occupied by British forces. The settlement of the newly-acquired territories was entrusted to Colonel Harcourt, who commanded the Company's troops, and a civil officer of the name of Mr. Melville. They were designated Commissioners, and they appear to have done their work with great thoroughness. In this settlement were included the zamindars of Sukinda and Madhupur, to whom *sanads* were granted entitling them to hold their estates at a fixed *jama* in perpetuity. These two *zamindaris* were then brought within the *Mogulbandi* and subjected to the general Regulations in force in Bengal.

Later in the year, came the Treaty of Deogaum, by which Bhonslay ceded a considerable tract of country belonging to the hill chiefs. With these, agreements or *kaulnamas* were entered into guaranteeing the perpetual enjoyment by them of their properties on definite terms. The zamindar of Sukinda alleged in his suit that he also held under a *kaulnama*, but he failed to establish his allegation, which was evidently made under some misapprehension.

There is no doubt, however, that a settlement was made with, and a *sanad* granted to, him by the Commissioners, the terms of which will be referred to in the course of this judgment.

By sec. 33 of Regulation XII of 1805 statutory confirmation was given to the *sanads* of the two Plaintiffs' ancestors.

The lands in dispute admittedly form part of the estates settled with the Plaintiff's ancestors in 1803 and in respect of which the revenue was fixed in perpetuity. The Plaintiffs accordingly urge that the Collector representing the Defendant has no right to exercise, in respect of these lands, the powers he claims under Act VI of 1870, B.C. The basis of his contentions will appear clearly when the course of legislation which led up to this enactment has been shortly explained.

From time immemorial it has been customary in India to remunerate officers charged with certain public or *quasi*-public duties by grants of lands to be held either rent-free or at a reduced rent.

One of the best known examples of these service-tenures is the grant of lands in lieu of wages to individuals who were charged with the performance of police duties in rural areas, and is commonly known as chaukidari chakran lands, from the word *chaukidar* which means "a watchman" and *chakran* "service."

The history of these chaukidari grants is set out with considerable lucidity in Lord Kingsdown's judgment in the case of *Joy Kishen Mookerjee* v. *The Collector of East Burdwan* (1). The following passage explains the origin of the system and the shape it assumed after the Decennial Settlement of 1789 and the Permanent Settement of 1793 :—

"It appears that these zamindars were entrusted, previously to the British posses-

(1) 10 M. I. A. 16 (1864).

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sion of India, as well with the defence of the territory against foreign enemies as with the administration of law and the maintenance of peace and order within their districts; that for this purpose they were accustomed to employ not only armed retainers to guard against hostile inroads, but also a large force of *thanadars*, or a general Police force, chaukidars, *paiks*, and other officers in great numbers under the name of chaukidars, *paiks*, and other descriptions, as well for the maintenance of order in particular villages and districts as for the protection of the property of the zamindar, the collection of his revenue and other services personal to the zamindar.

All these different officers were at that time the servants of the zamindar, appointed by him and removable by him, and they were remunerated in many cases by the enjoyment of land rent-free or at a low rent in consideration of their services.

The lands so enjoyed were called *chakran* or service lands. These lands were of great extent in Bengal at the time of the Decennial Settlement, and the effect of that Settlement was to divide them into two classes:—

First—*Thanadari* lands, which, by Ben Reg. I of 1793, sec. 8, cl. 4, were made resumable by the Government; the Government taking upon itself the maintenance of the general Police force and relieving the zamindar from that expense.

Second—All other *chakran* lands, which by Ben. Reg. VIII of 1793, sec 41, were, whether held by public officers or private servants, in lieu of wages, to be annexed to the malguzari lands and declared responsible for the public revenue assessed on the zamindars' independent *taluks* or other estates, in which they were included in common with all other malguzari lands therein."

Later on Lord Kingsdown explains the nature of the lands that were held by chaukidars in lieu of wages. Paraphrasing clause 4, sec. 8 of Regulation I of 1793, and sec. 41 of Regulation VIII of 1793, he says:—

"They were not to be included in the malguzari lands for the purpose of increasing the *jama*, because the zamindars had not the full benefit of them, but they were to be included in the malguzari lands for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest."

It is clear from the language of clause 4, sec. 8 of Regulation I of 1793, and of sec. 41 of Regulation VIII of the same year, that the power or "option" of resumption was reserved in respect of those lands that had been appropriated by the zamindar with the permission or under the authority of Government for the purpose of remunerating the chaukidars for their services, lands which, although included in the mahal and "annexed" to the malguzari lands, were not taken into consideration for the assessment of revenue, because in reality they formed no part of his assets.

Here it becomes necessary to notice the *sanad* that was granted to the zamindar of Sukinda in 1804, an attested copy of which is in the record. A *sanad* was also granted to the zamindar of Madhupur; it apparently has been lost, but it may be assumed that it was to the same effect as the zamindar of Sukinda's *sanad*, the attested copy of which is, so far as is material, as follows:—

"As the duties of the zamindar of the said Killa have from before been entrusted to Dhrubjoy Bhupati Harichandan, the zamindar, the zamindari of the said Killa has been bestowed upon and given to the said zamindar by the Government of the East India Company; you shall regard the said person as the permanent zamindar of the said Killa, and shall not act against his orders, instructions and advice, and shall not conceal and keep secret any matter whatsoever from him. The said zamindar

shall discharge the duties attached to the said zamindari in proper manner, and collect rent from the said zamindari in the best way according to the laws of the Government, and he shall without any objection pay into the Government Treasury 5,500 kahan cowris, the fixed annual amount payable to the Government; in proper time and according to proper instalments. He shall keep the tenants and the people in general satisfied and pleased by good treatment, and shall make such exertions and attempts as to make the zamindari improve and prosper, and he shall be so careful and vigilant that swords, guns and other war weapons and ammunition may not be manufactured in the said zamindari, and that theft, robberies at night and highway robberies may not be committed at any place; and in case such occurrence takes place, he shall arrest the thieves with stolen property and send them up to the Huzur (Government officers) for trial."

It will be observed that the *sanad* imposes on the zamindar the duty of preventing the commission of theft, robberies at night and highway robberies, "and in case of any such occurrence," of arresting the offenders and "sending them for trial." But it makes no provision regarding the machinery he was to employ for the purpose. The evident inference is that the Government was content with leaving to the zamindar the manner in which he was to discharge the duty of maintaining peace and order in his zamindari. The Government obviously made no provision therefor. Regulation XIII of 1805, which was enacted "for the maintenance of the peace and for the support and administration of the police in the Zillah of Cuttack," did not, as appears to be clear from the preamble and from the provisions of sec. 5, relate to the zamindaries of Sukinda and Madhupur, the settlement of which, as already stated, had been made by special *sanads*.

The subsequent enactments before the the Act of 1870 passed with the object of regularising or improving the rural police are not material to this judgment. It is sufficient to say that the system under which the village chaukidars as a part of the police machinery held parcels of land as remuneration for their services, wherever in vogue, remained practically untouched until 1870. It was then that the necessity was felt of bringing the rural police or village chaukidars under the direct control of the State.

The preamble to the Act states the object with which it was enacted.

Sec. 1 defines chaukidari chakran lands. It says :—

"The words 'chaukidari chakran lands' shall mean lands which may have been assigned, otherwise than under a temporary settlement, for the maintenance of the officer who may have been bound to keep watch in any village and report crime to the police, and in respect to which such officer may be at the time of the passing of this Act liable to render service to a zamindar."

The Act then lays down rules for the constitution of village panchayets or committees whose powers and duties are defined in considerable detail. In Part II it proceeds to deal with the chaukidari chakran lands.

Secs. 48, 49 and 50 form the most material provisions of the Statute for the purposes of the present discussion.

They run as follows :—

"XLVIII All chaukidari chakran lands before the passing of this Act assigned for the benefit of any village in which a panchayet shall be appointed shall be transferred in manner and subject as hereinafter mentioned to the zamindar of the estate or tenure within which may be situate such lands.

XLIX. All lands so transferred shall be subject to an assessment which shall be fixed at one-half of the annual value of such land according to the average rates of letting land similar in quality in the neighbourhood of such land, and such assessment shall be made by the panchayet of the village.

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L. Such assessment when made by the panchayet shall be submitted to the Collector of the district, and he or any other officer exercising the powers of a Collector by him thereunto appointed may approve or revise and approve the same (provided that it shall be lawful for the zamindar to contest the assessment before it is so approved), and after such approval the Collector of the district shall, by an order under his hand in the form in Schedule C, transfer to such zamindar such land subject to the assessment so approved."

Sec. 51 declares that the order of transfer made under sec. 50 shall operate to transfer the land to such zamindar subject to the assessment and subject to the rights of third parties.

Sec. 52 declares that the amount of the assessment shall be a permanent charge on the land; and the subsequent sections provide how it is to be realised in case of default of payment.

Sec. 58 empowers the Lieutenant-Governor to appoint commissions "to ascertain and determine"—

"The chaukidari chakran lands and other lands before the passing of this Act assigned for the maintenance of an officer to keep watch in any village and to report crime to the police in such district"

But for the contentions, to which their Lordships will advert later, that have been advanced on behalf of the Appellant, the Secretary of State for India, it would not have been necessary to give *in extenso* the above sections.

Act VI of 1870 (B.C.) was, when enacted, not introduced into Orissa; its operation was confined to Bengal where the category of lands referred to in Lord Kingsdown's judgment largely existed.

In 1899, the Act was, by a Resolution of the Government of Bengal, dated the 9th of February 1897, extended to Orissa.

It appears that the Plaintiffs, the zamindars of Sukinda and Madhupur respectively, in discharge of the duties imposed on them by their *sanads* to maintain peace and order within their estates, retained in their service a large number of chaukidars whom, according to the custom of the country, in lieu of wages they remunerated by grants of land. A register of these chaukidars was kept in the zamindari office, and it would appear that in the appointment of the chaukidars in more than one instance the Government Police officer had a voice. But the records show that the zamindar often changed the lands held by these men, and resumed what he considered to be in excess of their requirements.

Such was the condition of affairs in these two zamindaries when the Act was made applicable to Orissa.

Shortly after its extension, the Collector of the Cuttack District proceeded to apply its provisions to the lands held by the chaukidars of Sukinda and Madhupur respectively, on the ground that they were chaukidari chakran lands within the meaning of the Act. The Plaintiffs protested strongly against his proceedings: whilst expressing their willingness to submit to any reasonable contribution that might be required of them for the payment of the chaukidars who were to be appointed under the new system, they took exceptions to the Collector's attempts to resume and assess or re-assess their lands, and to transfer the same to them. Their objections were rejected, and the lands were then attached and put up to sale under the provisions of secs. 54 and 55 of the Act.

The Plaintiffs thereupon brought these actions in the Court of the Subordinate Judge of Cuttack, in substance, for a declaration that the Act did not apply to the lands in suit, and for an injunction restraining the Defendant Appellant from interfering with them.

The two suits were tried by two differ-

ent Subordinate Judges, who affirming the contention of the Collector that the lands in dispute were chaukidari chakran lands, dismissed the actions. On appeal, the High Court of Bengal, after an exhaustive examination of the subject, reversed the decisions of the first Court and granted the Plaintiffs the relief they sought.

The Secretary of State for India in Council has appealed in both actions; and it has been contended on his behalf that the learned Judges of the High Court were in error in referring to the previous legislation in order to construe Act VI of 1870 (B.C.); that the Act was applicable to all lands whether "assigned" by Government or by the zamindar for the maintenance of chaukidars; and that the onus was on the Plaintiffs to show that they were not chaukidari chakran lands.

Their Lordships think that this argument proceeds on a manifest fallacy. The lands in dispute admittedly lie within the ambit of the estates settled with the Plaintiffs' ancestors.

The Appellanats are the zamindars and "as such they have the *primâ facie* title," to use the language of this Board in the well known case of *Rajah Sahib Perhlad Sein* v. *Rajendra Kishore Sing* (2), to the full enjoyment of every parcel of land within their zamindaries for which they pay revenue to Government.

It rests on the Defendant to show that when the zamindaries were confirmed to the Plaintiffs' ancestors, it was subject to reservations in respect of any land which gave Government the power of resuming and assessing it. That onus the Defendant has not discharged; in fact it is not now contended for him that there was any such reservation. The power of resumption was, as already remarked, reserved by Government by the old Regulations in respect of lands which had been set apart by the zamindars with its permission or under its authority.

In Regulation I of 1793, the word used is "appropriated"; in Regulation XIII of 1805, the expression "assigned" is employed; but in both statutes the characteristics of the grants under which the lands were held depend on the implied authorisation of the Government which excluded them from consideration in the adjustment of the *jama* of the mahal. In the present case the Defendant has failed to show that any parcel of land was not taken into account in fixing the rent respectively payable by the Plaintiffs, nor that there was any obligation on the part of the Plaintiffs to make such grants. The only obligation on them was to maintain peace and order within their zamidaries. They entertained the services of chaukidars for whose maintenance they allotted from time to time certain lands of their own free will. The mere fact that some appointments were made with the approval of a Government officer cannot alter the nature of the grants.

In their Lordships' opinion the word "assigned" in the definition section of Act VI of 1870 (B.C.) means lands "assigned" by Government or appropriated under its authority or with its permission. Not only does the form of the "Transferring Order" in Schedule C of the Act clearly show that the expression "assigned" is applied to lands "assigned" by Government, as explained above, for the maintenance of the chaukidars and in respect of which they reserved the right to resume and transfer to the zamindar subject to an additional assessment; but the Resolution by which the Act was extended to Orissa leaves no possibility for doubt what the Government understood the Act to mean. Their Lordships do not propose to burden

(2) 12 M. I. A. 292, 331 (1869).

their judgment with long quotations from this interesting document: they only wish to refer to two passages which appear to them to place the matter beyond doubt. In one place the Lieutenant-Governor after reviewing the whole subject says :—

"As already remarked, the chaukidari jagirs are State grants. They are excluded in the temporarily-settled estates from the settlements made with the zamindars, while in the permanently-settled estates they cannot be legally interfered with by the zamindars. The latter have thus in both classes of estates no connection with the jagir lands, and the Lieutenant-Governor accepts the view that they are under no obligation to furnish lands or otherwise specially provide for the maintenance of the chaukidars. Their liability is to contribute to any funds raised in the same manner as other residents of the villages. Nor is it binding on the Government to continue the jagir grants for all time."

In the orders that are passed, a distinction is made with regard to the chaukidari holdings in the temporarily settled tracts, and those situated in "permanently settled estates."

With regard to these, it is declared that on resumption "the holdings should be included in the estates within which they lie, and form part of its assets in the future."

Nothing can be clearer in their Lordships' view than that the Act was designed to deal with lands which, although lying within a mahal, did not form a part of its assets, which is not the case with the zamindaries of Sukinda and Madhupur.

Their Lordships are of opinion that the Judgments and Decrees of the High Court should be affirmed and these Appeals dismissed with costs. And they will humbly advise His Majesty accordingly.

Solicitor, India Office, for the Appellant.

Solicitors : *Messrs. Barrow, Rogers* and *Nevill* for the Respondents.

B. D. *Appeals dismissed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 887 OF 1911.

CHAUDHURI, J.
1914,
12, February.

RAHIMUNISSA BIBI
v.
SHAIKH MANIK JAN
and others.

Waqf, *dedication for expenses of mosque and maintenance of family members, how far valid—Waqf Validating Act (VI of 1913), if would operate retrospectively.*

Where a person belonging to the Hanafi School of Mahomedan law made a waqf *wehreby he provided for the payment of expenses of and in connection with, a mosque and for regular monthly maintenance of the members of his family :*

Held—*That the dedication in connection with the mosque was valid, but not so the provision for the payment of maintenance to members of the family.*

That the Waqf Validating Act (VI of 1913) has no retrospective effect.

One Abdul Khansama, a Sunni Mahomedan governed by the Hanafi School of Mahomedan law, made *waqf* of certain properties under two *waqfnamas*, dated respectively the 7th of October 1880 and the 27th of September 1890. The second by a deed in the Bengali language was for the benefit of his children. It contained directions for the payment of monthly maintenance to the members of the family of the founder out of the balance left over after the expenses in connection with the upkeep of a mosque, for which purpose the dedication was ostensibly made, had been met.

Abdul Khansama died in 1892. The Plaintiff one of the heirs of the deceased, instituted this suit challenging the validity

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of the second *waqf* on the ground that the founder never gave effect to it, and that it was illusory and primarily for the benefit of his children, and praying, *inter alia*, for the construction of the *waqfnama* and declaration of the Plaintiff's share in the properties comprised in the *waqfnama* in the event of its being held invalid.

Mr. A. Rasul (*Dr. A. A. M. Suhrawardy* with him) for the Plaintiff.—*Waqf* for the benefit of one's descendants is not valid: *Abdul Fata* v. *Rasumay* (1). He also referred to *Bikani Mia* v. *Sukhlal Poddar* (2), *Md. Manwar Ali* v. *Rasulan Bibi* (3), *Munawar Ali* v. *Razia Bibi* (4) and *Alamgir Khan* v. *Kamrunnessa Khanun* (5). As to whether the fact of the founder of the *waqf* not having given effect to the *waqf* properties would nullify the *waqf*, the cases are clear on the point. Referred to *Md. Azizuddin* v. *Legal Remembrancer to Government, N.-W. P.* (6), also to *Buzlal Ghani Mia* v. *Adak Palari* (7). This last case was referred to also in connection with the contention as to whether the Waqf Validating Act, VI of 1913, had retrospective effect.

Messrs. S. K. Chakravarti, D. N. Basu, and *B. C. Ghose* for the various Defendants placed the *waqfnama* for construction by the Court.

The JUDGMENT OF THE COURT was as follows:—

CHAUDHURI, J.—This is a suit to have a *towliatnama* or *waqfnama*, dated the 12th Aswin 1297, executed by one Abdul Khansama, declared invalid, and for partition of the properties therein mentioned according to the Mahomedan law, should it be held to be invalid either wholly or in part. The partition is to be of such part as may be declared not legally affected by that instrument. So far as the appearing Defendants are concerned, no question has been raised as regards the correctness of the facts stated in the plaint either with regard to the pedigree set out therein, or the dates of death and the subsequent devolution of the shares of the parties named; but inasmuch as Defendants Nos. 5 and 6 have not appeared and some others have not put in their written statements, I give leave to the Plaintiff to prove the facts stated in the plaint, so far as the pedigree and devolution of shares are concerned, by filing an affidavit. Such affidavit is to be filed before the decree is drawn up.

It appears that Abdul Khansama executed a *waqfnama* on the 17th October 1880. So far as that *waqfnama* is concerned, I do not think there can be any doubt that it was a proper endowment. It is stated by some of the parties that there is a suit pending in the Alipore Court relating to this document. But the Plaintiff asserts that that suit has been recently withdrawn—a fact which is not admitted by the Defendant Sukur Jan. But whether that be so or not, I am not called upon to construe that document. Having regard to its tenor alone, it does not seem to be an illusory dedication. With the subsequent dealings with the property by the creator, whether they were treated by him as subject to a valid *waqf* or not, I am not concerned. I am not dealing with those contentions in this suit. Nothing in connection therewith has been brought before me in this suit. As regards the second deed, the question is how far it is a good dedication. It seems to me to be an illusory dedication, excepting in respect of the charitable trusts specifically

(1) I. L. R. 22 Cal. 619 P. C. (1894).
(2) I. L. R. 20 Cal. 116 (1892).
(3) I. L. R. 21 All. 329 (1899).
(4) I. L. R. 27 All. 320 P. C. (1905).
(5) 4 C. L. J. 442 (1907).
(6) I. L. R. 15 All. 323 (1893).
(7) 17 C. W. N. 1018 (1913).

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mentioned therein. It begins by saying that " provision for the livelihood and support of one's children and the destitute is also reckoned amongst religious deeds under the Mahomedan law," and that he therefore makes a charitable *waqfnama* " for children and the poor in the name of God." He constitutes himself the first Mutwalli by this deed, and lays down certain rules which are to govern the management of the so-called dedicated properties. Rule (1) states, " that out of the income of the properties, in the first place, Government revenue and taxes shall be paid and repairs to the mosque and other buildings shall be effected, when necessary." The other buildings do not refer to the mosque, but to other buildings belonging to the estate. Rule (2) runs thus: " out of the surplus remaining after deducting the charges of collection, the expenses of and in connection with the mosque at Narkeldanga founded under the first deed shall be paid in accordance with the list given in schedule " *kha*.' Rule (3): " that out of the amount of profits from the *waqf* properties which will remain after deducting the expenses, etc., in paras. 1 and 2 members of his family shall get monthly allowances as stated in schedule "*ga*." Rule (4) goes on to say that " out of the surplus, certain sums are to be paid by the Mutwallis for specially important matters relating to the dedicated property and on occasions of joy and grief of the Mutwallis and others." Rule (5) says that in the event of his or their children being totally extinct, the amount of maintenance will vest in the poor. Then there is a provision that in the event of the monthly allowance lapsing, the Mutwalli for the time being is to distribute it according to the provisions of the Mahomedan law. Then elaborate rules are laid down for the appointment of Mutwallis. He recites the earlier endowment and says that it is to be treated as part of the present *waqf*. Then in para. 28 he says that his heirs (naming them) are to get their respective shares according to the Mahomedan law in the property in his " *khas* " possession, and the surplus is to be similarly divided amongst them, after deducting all costs from the amount of the income of the *waqf* properties. I think that the dedication for *waqf* purposes of property yielding an income of Rs. 316 is good. This amount should be set apart, namely, Rs. 300 mentioned in schedule " *kha* " and a sum of Rs. 8 for the salary of a sircar for making collections and Rs. 8 for the salary of the person who is to be the manager amongst the Mutwallis. Properties sufficient to yield the above income and also for the upkeep of the mosque at Narkeldanga are to be set apart, and also such amount as may be necessary for the payment of the Government revenue and taxes. By upkeep I meant repairs, etc., because all other expenses are provided for in schedule " *kha*." With regard to the rest of the property, I considered there has been no proper dedication It was intended, and the only intention appears to be, to tie up the property for the benefit of his children and heirs, and, as such, cannot be considered to have been properly endowed for religious purposes. The properties mentioned in the first *waqfnama*, I am told, are quite sufficient for the expenses of the mosque; and since that document has been made part of the present document, and since all those properties are included in the document under construction, I have made the order aforesaid.' The parties are declared entitled to the shares mentioned by learned Counsel. An affidavit is to be put in, shewing that the shares have been correctly calculated. 'As there is no contest in respect of the shares and it is only a

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matter of arithmetical calculation, I allow such an affidavit to be put in. Since the institution of this suit, the Waqf Validating Act of 1913 has been passed. It was passed in March 1913, and it seems to me to have prospective effect from that date. I do not think, it has any retrospective effect. It does not seem to have been intended that it should have retrospective effect. The managing Mutwalli, namely, the first Defendant, will get credit for all payments made by him to the co-sharers. The mesne profits are only to be calculated for the last six years. In setting apart the property to meet the above valid charges, the Commissioner of Partition is to take into account the properties purchased by Sukur Jan in execution of decrees obtained by her in other Courts and also the sale-certificates she holds, that is to say, that, unless absolutely necessary, those properties are not to be set apart for the above purposes. There will be a decree for partition as regards the rest of the property according to the shares declared. Liberty to the parties to name the Commissioner of Partition hereafter. Costs up to date are to be paid out of the estate of Abdul Khansama. Costs of partition will be according to the shares of the parties respectively. Costs of the taking of the accounts above mentioned will be dealt with after the report. Liberty generally to the parties to apply. All the costs are to be taxed on scale No. II as of a contested action. Copies of the affidavit relating to the working out of the shares and pedigree are to be given to the parties appearing for the purpose of verification. It is to be filed as soon as practicable.

Babu B. P. Chunder, Attorney for the Plaintiff.

Babus J. P. Ghose, M. N. Dutt and *G. C. Dey*, Attorneys for the various Defendants.

Suit decreed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1682 OF 1910.

NEWBOULD, J.
ROY, J.
1913,
6, May.

DOYAMAYEE CHOWDHURANI and ors., Defendants, Appellants,
v.
NARENDRA KISHORE ROY and ors., Plaintiffs, Respondents.

Act XI of 1859, sec. 37—Taluk in existence before permanent settlement—Portion thereof transferred and held under a new name—Such portion if protected, when it can be traced to original taluk.

When a portion of a taluk existing from before the permanent settlement is transferred and that portion is subsequently held in proportionate jama *under a name different from the original taluk, but the subsequent transfer and descent thereof can be traced from the original taluk, the portion so transferred is also protected under sec. 37, Act XI of 1859.*

This was an appeal preferred on the 24th of May 1910 against the decree of Babu Jogendranath Bose, Subordinate Judge of Zilla Noakhali, dated the 11th of February 1910, reversing the decree of Babu Norendra Nath Lahiri, Munsif, 2nd Court at Feni, dated the 28th of June 1909.

The facts of the case material to this report will appear from the judgment.

Babus Dhirendralal Kastagir and *Probodh Kumar Das*, for the Appellants.

Babu Akhay Kumar Bannerjee, for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for khas possession brought by an auction-purchaser at a revenue sale. It is now admitted that the land which is the subject of the suit formerly appertained to taluk Rahamat

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Rafi which was in existence at the time of the permanent settlement. From Exhibit B it appears that in the year 1222 (B.S.) this taluk was divided into two. A new taluk called Radha Benode was created and the other portion of the taluk was still called Rahamat Rafi. The rent of the old taluk was proportionately assessed on these two taluks. The land in this suit appertains to the portion that was allotted to taluk Radha Benode. The Court of first instance held that this taluk existed from the time of the permanent settlement and dismissed the Plaintiff's suit for khas possession on the ground that the Defendants were protected by the provisions of sec. 37 of Act XI of 1859. On appeal the learned Subordinate Judge held that the taluk Radha Benode must be held not to have been in existence before the division of the old taluk in 1222, and as it was not in existence from the time of the permanent settlement, the Plaintiff was entitled to khas possession. The lower Appellate Court therefore decreed the suit.

On behalf of the Appellants the case of *Nobendra Kishore Roy* v. *Durga Charan Chowdhury* (1) has been cited. The facts of that case closely resemble the facts of the present case. It was there held that when a portion of a taluk existing from before the permanent settlement was transferred and the said portion was subsequently held in proportionate *jama* under a name different from the original taluk, but the subsequent transfer and descent thereof can be traced from the original taluk, the portion so transferred is also protected under sec. 37 of Act XI of 1859. That ruling in our opinion is binding on us as regards the decision of the present case.

For the Respondents it is contended that the finding of the learned Subordinate Judge is a finding of fact with which we cannot interfere in second appeal. We are unable to accept this contention. As has been pointed out in the case of *Mullick Chand Das* v. *Satish Chandra Das* (2), what the effect of the division of a taluk is must depend upon the intention of the parties. Had the learned Subordinate Judge come to a finding that the intention of the parties in 1222 was that the division of the old taluk changed the incidents of the tenure, we should be bound by such a finding. But as he has come to no finding as to the intention of the parties, we are not unable in second appeal to form our own conclusion, and the conclusion we arrive at is that judging from the circumstances of the case there was no intention to alter the condition of the tenure.

We accordingly decree this appeal and reverse the finding and decree of the lower Appellate Court and restore those of the Court of first instance.

The Appellants are entitled to their costs in all Courts.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3060 OF 1910.

N. R. CHATTERJEA, J. WALMSLEY, J. 1913, Heard, 1, July. Judgment, 29, August.

E. H. STEVENS, Defendant, Appellant, *v.* JANKI BALLABH and others, Plaintiffs, Respondents.

Hindu widow, debts contracted by, for costs of litigation—Binding effect on reversioner—Legal necessity—Facts necessary to be proved by lender—Rate of interest must be proved necessary even when legal necessity for loan exists.

(1) 15 C. W. N. 515 (1910).

(2) 11 C. L. J. 56 (1909).

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The Plaintiff, who was an assignee of a mortgage executed by a Hindu widow in respect of her husband's property, of which she was in possession as a Hindu widow, sued to enforce the mortgage against the property in the hands of the reversionary heir; and it appeared that the money was borrowed for meeting the costs of litigation relating to certain suits brought by certain ex-managers of the estate for salary and it appeared that at the time the money was borrowed, a portion of the estate was sold in execution of a decree obtained by one of the ex-managers and other properties were going to be sold in execution of another decree obtained by him and there was a heavy claim against the estate by another manager:

Held—*That the debts contracted by a Hindu widow for meeting the costs of litigation in defending her life-estate in her husband's property or for protecting the estate are binding upon the estate in the hands of the reversioner.*

That it was not necessary for the lender in the present case to show that the debt, which was in litigation, for meeting the costs of which he lent the money to the widow, was or was not her personal debt. It is sufficient, if it is shewn that there was pressure upon the estate, that there was necessity for borrowing money for the costs of the litigation or that the creditor made reasonable enquiries and was satisfied of the necessity for the loan.

That although a loan by a widow may be necessary, the rate of interest at which she borrowed must be proved to be necessary before interest at that rate can be allowed.

This was an appeal preferred on the 8th September 1910 against the decree of S. C. Mullick, Esq., District Judge of Zilla Gya, dated the 20th June 1910, affirming a decree of Babu Umanath Ghoshal, Sub-Judge of that district, dated 24th December 1909.

The material facts will appear sufficiently from the judgment.

Babus Umakali Mukerjee, Soroshi Ch. Mitter and *Chandra Sekhar Banerjee*, for the Appellant.

M. Md. Mustafa Khan, for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit to enforce a mortgage bond, executed by a Hindu widow, against the property of her husband in the hands of the reversionary heir. It appears that one Bacho Kuar, the widow of one Gudar Sahay, borrowed Rs. 2,000 from the Defendant No. 6, and executed a mortgage bond on the 3rd November 1901, in which it was stated that the money was required for the conduct of certain litigations with two persons, namely, Mr. James Wilson and Mr. Martin Gregory. The Plaintiff is an assignee of the mortgage from the Defendant No. 6.

The Courts below concurred in decreeing the suit and the Defendants appealed to this Court.

The question raised in this appeal is, whether a Hindu widow in possession of the estate of her husband can charge the estate by borrowing money for costs of litigation. We think that debts contracted by a Hindu widow for meeting the costs of litigation in defending her life-estate in her husband's property or for protecting the estate are binding upon the estate in the hands of the reversioner. See *Amjad Ali* v. *Moniram Kolita* (1), *Debi Doyal Sahoo* v. *Bhan Pertab Singh* (2) and *Braja Nath* v. *Jages* (3). It is contend-

(1) I. L. R. 12 Cal. 52 (1885).
(2) I. L. R. 31 Cal. 433 (1903).
(3) 9 C. L. J. 346 (353) (1909).

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ed, however, that the litigation, for meeting the costs of which the debt was incurred, related to certain suits brought by certain ex-managers for salary, that the salary of the manager should be treated as a personal debt of the widow and that if it is a personal debt of the widow, the costs of litigation for contesting such debt should also be considered as her personal debt.

The question whether the salary of a manager, which is part of the costs of management of the estate, is or is not a personal debt of the widow, does not call for determination in this case. The decision of the question would, we think, depend upon the circumstances of each case. If the widow is in enjoyment of the rents and profits of the estate, and they are sufficient to pay the manager's salary, it cannot be held that the widow is entitled to appropriate the profits, and throw the liability for the costs of management of the estate on the reversioners by charging the estate. If, on the other hand, the collections are not sufficient for meeting the expenses of the widow and the costs of management, where, for instance, the estate is involved in heavy litigation and is heavily encumbered (as it is said to be in the present case), the charge created by the widow would be binding upon the estate. It is impossible therefore for any one to say whether in a particular case the manager's salary is a personal debt of the widow, unless he goes into the whole account of the estate, and the lender cannot be expected to do so before he lends money to a widow for meeting the costs for defending a suit relating to the manager's salary. We are of opinion that it is not necessary for the lender in the present case to show that the debt, which was in litigation, for meeting the costs of which he lent the money to the widow, was or was not her debt; were it otherwise, it would be impossible in many cases for a Hindu widow to raise money for meeting the costs of litigation. It is sufficient if it is shown that there was pressure upon the estate, that there was necessity for borrowing money for the costs of the litigation, or that the creditor made reasonable enquiries and was satisfied of the necessity for the loan.

It appears that one Mr. Wilson obtained two decrees against Bachu Kuar. We have got only the order-sheets in the execution cases (Nos. 213 and 269 of 1911) of Wilson, on the record of this case. After the close of arguments in this Court the Respondent wanted to put in certified copies of certain plaints, decrees and execution petitions for showing that the decree which was executed in execution case No. 269 was in respect of a mortgage bond for Rs. 1,000 for paying off a decree passed for a debt incurred by the husband of Bachu Kuar, and that the decree which was executed in the other execution case was upon a mortgage bond for Rs. 5,000 borrowed for payment of the revenue of the estate which accrued due, and for expenses of litigation, after her husband's death. We do not think, we ought to receive this additional evidence at this stage. Had we considered it necessary that an enquiry into the matter should be made, we could have directed the Court below to take the additional evidence.

It appears however from the order-sheets that some properties of the estate were sold in execution of one of the decrees of Mr. Wilson, and an application was made by Bachu Kuar for setting aside the sale, and that proceedings in execution of the other decree were also pending. Another suit was instituted by one Mr. Martin Gregory for about Rs. 15,000 on account of the salary and allowances of his deceased brother Mr. George Gregory as manager

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of Bachu Kuar's estate, together with interest thereon. The Court of Appeal below has held that there is no reason for holding that her case had no substance at all, and was entirely without foundation, although the Judge who tried the suit decided it against her.

It thus appears that a portion of the estate of which Bachu Kuar was in possession as a Hindu widow was sold in execution of a decree, and other properties were going to be sold in execution of another decree of Mr. Wilson, and there was a heavy claim by Mr. Gregory against the estate.

Under these circumstances Bachu Kuar was entitled to defend the cases for the purpose of protecting the estate and her own life-interest in the properties of her husband, and costs properly incurred in the *bond fide* prosecution of the litigation would constitute legal necessity.

We are of opinion however that the findings arrived at are not sufficient for the disposal of the case. Although the mortgage bond recites that the money raised under it was required for the conduct of cases filed at Muzaffarpur and the evidence set out in the judgments of the Courts below also refers to the cases of Wilson and Gregory in the Muzaffarpur Courts, the learned District Judge in considering the question whether the amount advanced, namely, Rs. 2,000 was actually spent for legal necessity refers to the evidence of the Plaintiff's witness No. 2, showing that Rs. 1,200 was taken down by him to Calcutta soon after the bond was executed, and there paid to the lady's *ammuktear* and the remaining Rs. 800 was also spent by certain person whom the witness names for some cases of the lady." We do not understand how the Rs. 1,200 which the learned Judge finds was sent to Calcutta and paid to the lady's *ammuktear* could be required for meeting the costs of litigation at Muzaffarpur for which the amount is said to have been borrowed and how the said Rs. 1,200 could be considered a debt consituting legal necessity, when there is no finding for what purpose the said money was spent. The learned Judge holds that a full consideration of the question whether the creditor made enquiries about the necessities of the loan does not arise after the finding that it was for a legal necessity that the debt was contracted. But the facts found by the learned Judge do not show that there was a legal necessity for Rs. 2,000. The Plaintiff, who wants to enforce the mortgage against the estate in the hands of the daughters must establish either that there was in fact necessity for Rs. 2,000—the amount lent, or that he was satisfied, after making reasonable enquiries, that there was necessity for the said amount. We are accordingly of opinion that the findings arrived at by the learned Judge are not sufficient for holding that there was legal necessity for Rs. 2,000. The case should accordingly go back to the lower Appellate Court for a proper finding, whether there was necessity for Rs. 2,000 for the purposes for which the money was borrowed, or whether the creditor made reasonable enquiries as to the necessity of the loan.

There remains the question of the rate of interest. As pointed out by their Lordships of the Judicial Committee in the case of *Hurronath* v. *Randhir Singh* (4), although a loan by a widow may be necessary, the rate of interest at which she borrowed must be proved to be necessary, before interest at that rate can be allowed. The learned Judge is of opinion that because the loan was taken from a man of the Gya District, there was nothing

(4) I. L. R. 18 Cal. 311 (1890).

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very unreasonable in the high rate of interest. We are of opinion, however, that he must come to a finding whether there was necessity for borrowing at the rate of 24 per cent. interest per annum.

The decree of the lower Appellate Court is accordingly set aside, and the case sent back to that Court to be dealt with in accordance with the observations made above. Costs to abide the result.

Case remanded.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORDER No. 49 OF 191

AND

RULE No. 122 OF 1914.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
13, March.

RASHMONI DASSI,
Petitioner, Appellant.

GANODA SUNDARI DASSI,
Opposite Party,
Respondent.

Guardians and Wards Act (VIII of 1890), secs. 39, 47, 48—Revocation of an order appointing a guardian on the ground that alleged minor attained majority before appointment of guardian, if an order under sec. 39 and if appealable—Sec 39, if exhaustive—Jurisdiction of District Judge to deal with matters of which cognizance may be required in the interests of justice—Inherent jurisdiction of Courts to recall orders obtained by suppression or misrepresentation of facts—Distinction between revisional and appellate jurisdictions—Revisional jurisdiction, if may be invoked for ascertaining if lower Court correctly appreciated evidence

On the application of the Appellant, she was appointed by the District Judge guardian of the person and property of the Respondent, her daughter-in-law, who subsequently applied to the District Judge, for revocation of his order, on the ground that she had attained majority before the order appointing the Appellant as her guardian was made. The District Judge took evidence and finding that the Respondent's allegation was true revoked his previous order. Against this order of revocation, the Appellant preferred an appeal to the High Court.

Held—*That sec. 39 of the Guardians and Wards Act specifies the circumstances under which the Court may remove a guardian appointed under the statute, and the order in question was not made under the section and consequently was not appealable under cl. (9) of sec. 47.*

Held *(as to the contention that as there was no section of the Guardians and Wards Act applicable in terms to the present matter, the District Judge was incompetent to enquire into the allegations of the Respondent)—That a Court which exercises powers under the Guardians and Wards Act has ample inherent jurisdiction to deal with matters brought before it, of which cognizance may be required in the interests of justice and the District Judge had jurisdiction to deal with the matter in question. Sec. 151, C. P. C., which provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, does not formulate a new doctrine, but merely furnishes legislative recognition of a well-established principle which is applicable quite as much to Courts called upon to deal with matters under the Guardians and Wards Act as to ordinary Civil Courts.*

If an order has been obtained from the Court by a suppression of facts, if the Court has been overreached and has been induced to assume jurisdiction over a matter in which, upon a true state of facts, it does not possess jurisdiction, the Court is competent to recall the order obtained from it by suppression or misrepresentation of facts.

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That sec. 48 was not a bar to the present proceedings and the District Judge had jurisdiction to entertain the application in the exercise of his inherent power.

Held (*as regards the application for revision of the order of the District Judge*)—*That a Court in the exercise of its appellate jurisdiction investigates the facts, and, if necessary, substitutes its own appreciation of the evidence for that of the primary Court, but when the Court as a Court of revision looks into the evidence, it does so with a view to determine whether the subordinate Court has assumed a jurisdiction which it did not possess, or declined a jurisdiction which it did possess, or has in the exercise of its jurisdiction acted illegally or with material irregularity, and in the present case the High Court could not be rightly invited by the Petitioner to examine the evidence with a view to determine whether the District Judge correctly appreciated its effect.*

This was an appeal from a decision of H. Walmsley, Esq., District Judge of 24-Parganas, dated 14th January 1914.

The facts of the case fully appear from the judgment.

Mr. B. C. Mitter, Babu Provesh Chandra Mitter, Dr. Sarat Chandra Basak and *Babu Surendra Madhob Mullick*, for the Petitioner, Appellant.

Babus Umakali Mukerjee, Biraj Mohun Mazumdar, Girija Prosanna Roy Choudhuri and *Dhirendra Krishna Roy*, for the Opposite Party, Respondent.

The JUDGMENT OF THE COURT was as follows :—

M. A. No. 19 of 1914.

MOOKERJEE, J.—We are invited to consider the propriety of an order by which the Court below has recalled an order previously made for the appointment of the Appellant as guardian of the person and property of her daughter-in-law, the Respondent.

On the 20th January 1912 the Appellant made an application under the provisions of the Guardians and Wards Act. The application was not opposed, and on the 15th May a conditional order was made as a matter of course in her favour. She was called upon to furnish security, and as soon as the order of the Court had been carried out in this respect, a formal order of appointment was drawn up on the 26th November 1912. On the 21st July 1913, the daughter-in-law applied to the District Judge for revocation of the previous order on the ground that she had attained majority before her mother-in-law was appointed guardian of her person and property. The District Judge thereupon took evidence, and ultimately came to the conclusion that the daughter-in-law had been born on the 23rd January 1893, and had consequently attained majority on the 23rd January 1911, long before the order for the appointment of her mother-in-law as guardian of her person and property had been made. In this view, the District Judge has recalled the orders of the 15th May and the 26th November 1912. The order of revocation has been assailed in this Court on behalf of the mother-in-law, and we have been invited to examine its propriety in the exercise either of our appellate or of our revisional jurisdiction.

A preliminary objection has been taken to the competency of the appeal, and it has been argued that as the order was not made under any of the clauses of section 39 of the Guardians and Wards Act, it cannot be questioned by way of appeal under any of the clauses of sec. 47. This preliminary objection raises a question of considerable importance as to the true

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nature of the jurisdiction which has been exercised by the District Judge in this matter. On behalf of the Appellant it has been broadly contended that the District Judge had either jurisdiction to take action under sec. 39, or had no jurisdiction at all to deal with the matter in controversy before him. In support of the former view, it has been argued that sec. 39 is not exhaustive and that the circumstances specified therein, under which the Court is competent to remove a guardian, are merely illustrative. We have in substance been invited to read sec. 39 as if the legislature had provided that "the Court may remove a guardian appointed by the Court for the following amongst other reasons." We are not prepared to accept this view as well-founded. If the legislature had intended to give illustrations merely of the contingencies in which the Court may remove a guardian in the exercise of the power conferred upon it by sec. 39, the section might have been differently framed. In our opinion, sec. 39 specifies the circumstances under which the Court may remove a guardian appointed under the statute. It is worthy of note that each of the circumstances specified in the section is of such a character, that if its existence is established, the Court would have no option but to remove the guardian in the interests of the minor. Consequently we must hold that the order in this case was not made under sec. 39. We may add that the only clause of sec. 39, which, it was suggested, might possibly cover the case, if reliance had to be placed upon a special clause, was clause (j) which provides that the Court may remove a guardian by reason of the guardianship of the guardian ceasing or being liable to cease under the law to which the minor is subject. But if it be a fact that when the order for appointment of the guardian was made in the present case, there was no infant in respect of whom the Court could exercise jurisdiction, no question clearly arises about the cessation of guardianship. There is no escape, consequently, from the position that sec. 39 does not apply; and this necessarily leads to the inference that the order is not appealable under clause (9) of sec. 47 which provides for an appeal to this Court from an order, made by a subordinate Court under sec. 39, for removal of a guardian. The first branch of the contention of the Appellant must consequently fail.

As regards the second branch of the contention of the Appellant, it has been broadly argued that if the District Judge had no jurisdiction to entertain an application under sec. 39, he had no jurisdiction to deal with the matter at all. The contention in substance is that the Judge, invested with authority to deal with matters under the Guardians and Wards Act, constitutes a special Court created by the Legislature for specified purposes and that the limits of his jurisdiction must be sought for within the four corners of the Statute. The position taken up by the Appellant is that as there is no section of the Guardians and Wards Act applicable in terms to the present matter, the Judge was incompetent to inquire into the allegations of the Respondent. In our opinion, this contention is entirely baseless. A Court which exercises powers under the Guardians and Wards Act has ample inherent jurisdiction to deal with matters brought before it, of which cognizance may be required in the interests of justice. Sec. 151 of the Code of Civil Procedure of 1908 which provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice,

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or to prevent abuse of the process of the Court, does not formulate a new doctrine. It merely furnishes legislative recognition of a well-established principle, which is applicable quite as much to Courts called upon to deal with matters under the Guardians and Wards Act as to ordinary Civil Courts. The futility of the contention of the Appellant may be illustrated by an obvious example. Sec. 10 of the Guardians and Wards Act specifies the contents of the application to the Court: the Appellant is required, amongst other matters, to state, so far as can be ascertained by him, the date of birth of the minor. Suppose after the application has been made and before the order of the Court has been passed therein, it is brought to the notice of the Court by the person in respect of whom a guardian is proposed to be appointed or by some person on his behalf, that he is not an infant, that he has as a matter of fact attained majority and that consequently the provisions of the Guardians and Wards Act cannot be applied to his case. In such an event, it would plainly be competent to the Court to determine whether the alleged infant was in reality an infant. The Court has jurisdiction to determine the question, indeed, it is incumbent upon the Court to investigate the matter, on the fundamental principle that when the jurisdiction of a Court is invoked in respect of a particular matter and such jurisdiction is challenged, it is the duty of the Court to determine the essential facts on the actual existence of which alone the Court is competent to assume jurisdiction. It is indisputable that the Court is competent to make an enquiry of this description, even though it may ultimately transpire that the Court has no jurisdiction over the matter in controversy; in other words, the Court has jurisdiction to determine that it has no jurisdiction to deal with the matter brought before it [*Hurree Prosad* v. *Koonjo Behary* (1), *Hukum Chand* v. *Kamalanand* (2), *Budh Singh* v. *Nirad Baran* (3), *Hudson* v. *Morgan* (4)]. This view cannot be seriously challenged; and once it is accepted, as it must be, it follows inevitably that, if even after the order has been made on the application, the Court is apprised that it has been made to assume jurisdiction in a matter over which it has in reality no jurisdiction; the Court has inherent power to investigate the matter and to recall the previous order, if it transpire that it has been made without jurisdiction. It is needless to refer to authorities in support of this proposition: but if authority is required, reference may be made to the classical work on Chancery Practice by Daniell, Vol. II, page 1303, where the following statement will be found: "If an order has been made as a matter of course and if there is any irregularity in the order or if it has been obtained upon any false suggestion or by the suppression of any material fact, it will be discharged on special application by motion, although on the merits it would have been proper to make the order." There are numerous cases to be found in the reports where this doctrine has been applied in England, and amongst these, reference may be made to the cases of *Brookes* v. *Purton* (5), *St. Victor* v. *Devereux* (6), *Marquis of Hertford* v. *Suisse* (7), *Holcombe* v. *Antrobus* (8),

(1) Marshall 92; 1 Hay 238; W. R. Spl. 29; Ind. Jur. O. S. 20 (1862).
(2) I. L. R. 33 Cal. 927 (94): s. c. 3 C. L. J. 67 (1905).
(3) 2 C. L. J. 431 (437) (1905).
(4) I. L. R. 36 Cal. 713 (721): s. c. 9 C. L. J. 563; 13 C. W. N. 651 (1909).
(5) 4 Bev. 494 (1841).
(6) 6 Bev. 584 (1843).
(7) 7 Bev. 160 (1844).
(8) 8 Bev. 405 (1845).

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Wilkin v. *Nainby* (9), *DeFeucheres* v. *Dawes* (10), *Wyllie* v. *Ellice* (11), *Brignell* v. *Whitehead* (12), *Harris* v. *Start* (13), *Cooper* v. *Lewis* (14), *Bidder* v. *Bridges* (15). But the principle is essentially of much wider scope than is indicated by the passage to which we have just referred. It is not confined in its application to *ex-parte* orders or to orders made as a matter of course. If an order has been obtained from the Court by a suppression of facts, if the Court has been over-reached and has been induced to assume jurisdiction over a matter in which, upon a true state of facts, it does not possess jurisdiction, the Court is competent to recall the order obtained from it by suppression or misrepresentation of facts. This view is supported by a long series of decisions amongst which may be mentioned *Hiralal* v. *Premmoyee* (16), *Gurdeo* v. *Chandrika* (17), *Udit* v. *Radhika* (18), *Nagardas Bacharaj* v. *Anandarao* (19). Much stress however was laid upon the provisions of sec. 48 of the Guardians and Wards Act where it is stated that save as provided by sec. 47 (which specifies appealable orders) and by sec. 622 of the Code of 1882 (which defines the grounds for revision), an order made under the Act shall be final and shall not be liable to be contested by suit or otherwise. The reference to sec. 47 of the Guardians and Wards Act and to sec. 622 of the Code of 1882 indicates that the Legislature had in view the question of the liability of an order to be challenged by way of appeal or revision before a superior tribunal; the Legislature did not contemplate, it is said, a reconsideration of the order by the Court itself on the ground that the Court had been induced to assume jurisdiction in a matter in which it had no jurisdiction. But we are clearly of opinion that section 48 is not a bar to the present proceedings and that the District Judge had jurisdiction to entertain the application in the exercise of his inherent powers. Consequently his order is not appealable. The preliminary objection must accordingly be allowed and the appeal dismissed with costs. We assess the hearing fee at three gold mohurs.

Rule No. 122 of 1914.

As regards the application for revision, it is plain that it can be sustained on the ground either that the Court had no jurisdiction to deal with the application or that the Court in the exercise of its jurisdiction has acted illegally or with material irregularity. We have already held that the District Judge had jurisdiction to deal with the matter; and therefore the only point for consideration is, whether he acted illegally or with material irregularity. It has been suggested in support of the application that important evidence was improperly excluded and that if such evidence had been admitted, it could have been shown that the application for revocation of guardianship was not *bonâ fide*. Reference has also been made in the course of argument to portions of the evidence. We may, in this connection, observe that it is competent to the Court to investigate the facts in revision, if the Court is satisfied that such a step is needed in the ends of justice, as was done in the case of *Kailash Chandra Haldar* v. *Bisswanath Pramanick* (20). But we must

(9) 8 Bev. 465 (1845).
(10) 11 Bev. 46 (1848).
(11) 11 Bev. 99 (1848).
(12) 30 Bev 229 (1861).
(13) 4 My. & Cr 261 (1838).
(14) 2 Phil. 178 (1847).
(15) 26 Ch D 1 (3) (1881).
(16) 2 C. L. J. 306 (1905).
(17) 5 C. L. J. 611 (620): s. c. I. L. R 36 Cal. 193 (1907).
(18) 6 C. L. J 662 (1907).
(19) I. L. R. 31 Bom. 590 (1907).
(20) 1 C. W N. 67 (1896).

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guard against the possible assumption that the Court may, in a matter like this, in the exercise of its revisional jurisdiction, assume appellate powers. One aspect of the fundamental distinction between the exercise of appellate and revisional powers was explained in the case of *Shivanath* v. *Joomakashinath* (21). A Court in the exercise of its appellate jurisdiction investigates the facts, and, if necessary, substitutes its own appreciation of the evidence for that of the primary Court. But when the Court as a Court of revision looks into the evidence, it does so with a view to determine whether the subordinate Court has assumed a jurisdiction which it did not possess, or declined a jurisdiction which it did possess or has in the exercise of its jurisdiction acted illegally or with material irregularity. If this distinction were overlooked, the superior Court might, in the name of revisional jurisdiction, exercise appellate powers. Consequently, in the case before us, we cannot be rightly invited by the Petitioner to examine the evidence with a view to determine whether the District Judge has correctly appreciated its effect. But we may look at the evidence to determine whether he has acted illegally or irregularly in the exercise of his jurisdiction. Upon that point we are satisfied that the ground taken by the Petitioner has not been established. There is no indication whatever from the proceedings in the Court below that the District Judge excluded any evidence the true bearing of which was explained to him. The only ground on which the Petitioner invites the Court to interfere in the exercise of revisional jurisdiction thus completely fails.

The result is that this Rule is discharged; we make no separate order as to costs.

(21) I. L. R. 7 Bom 341 (1883).

BEACHCROFT, J.—I agree.

Appeal dismissed;
Rule discharged.

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE No. 768 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 5 and 6, February.
Judgment, 6, February.

HARADHONE DEBNATH, Plaintiff, Appellant,
v.
BHAGABATI DASI & ors., Defendants, Respondents.

Specific Relief Act (I of 1877), sec 22—Specific performance, suit for—Sale not completed in time through vendor's non-performance of essential term within time assigned—Vendor if may sell property to another after expiry of time—Delay—Hardship, brought on by vendor—Subsequent purchaser with notice making improvements, if entitled to compensation.

Where a vendor agreed to satisfy the purchaser within a specified time that " she had a valid saleable interest in the property, by shewing a copy of the order of the Collector about the registration of her name in respect of the property, the Will of her mother and other papers relating thereto ", but neither the Will (which had been filed in Court for probate) nor a certified copy thereof was shewn, but the vendor produced a compromise petition between the parties to the probate proceeding :

Held, *in the circumstances of the case, that it was impossible to hold that the production of the Will was a non-essential term of the agreement, and non-completion of the sale was not due to the default of the purchaser who had refused to accept the compromise petition in lieu of the Will or a certified copy thereof.*

Where property which had been agreed to be sold to Plaintiff was sold to Defendant on 30th August, the conveyance being

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registered on the following day, and the Plaintiff sued for specific performance on the 5th November on the re-opening of the Civil Courts which was closed for the Puja Holidays from 2nd October to 3rd November:

Held—*There was not such a delay in instituting the suit as would justify the Court in refusing specific performance.*

Specific performance will be refused against a vendor on the ground of hardship as contemplated in sec. 22 (2) of the Specific Relief Act, where the vendor has entered into the contract without full knowledge of the circumstances.

Where a transferee of property buys with notice of a prior agreement to sell it to another and makes improvements in the property without inquiry of the latter:

Held—*That in a suit by the latter for specific performance, he was not entitled to be reimbursed for the costs of the improvements.*

This was an appeal from a decision of A. Goodove, Esq., District Judge, 24-Parganas, dated 2nd February 1912, modifying that of Babu Bankim Chandra Mitter, Sub-Judge of 24-Parganas, dated 31st July 1911.

The material facts will appear from the judgment.

Babus Mahendra Nath Roy, Mohini Mohun Chatterjee, Probodh Chandra Dutta for *Suresh Chandra Das* for the Appellant.

Dr. Sarat Chandra Basak and *Babu Amarendra Nath Bose* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Plaintiff in a suit for specific performance of a contract of sale of immoveable property. On the 22nd April 1910, the first Defendant entered into an agreement with the Plaintiff to transfer to him the disputed property for Rs. 3,000 and received Rs. 500 as earnest money; she subsequently received an additional sum of Rs. 10. Under the contract, the transaction was to be completed within three months. The conveyance, however, was not executed, under circumstances which we shall presently state, and on the 30th August 1910 the first Defendant, it is alleged, sold the property in suit to the second Defendant, who took the conveyance in the name of his wife, the third Defendant. The Plaintiff thereupon commenced this action on the 5th November 1910. The Court of first instance held that the transferee had taken with notice of the prior contract, and that the Plaintiff was consequently entitled to a decree for specific performance. Upon appeal, the District Judge has reversed this decision. He has dismissed the claim for specific performance, but has directed the first Defendant to refund to the Plaintiff Rs. 510 paid by him as earnest money. The decree of the District Judge has been assailed in this Court on the ground that upon the facts found specific performance should have been decreed. This view has been controverted on behalf of the Respondents, and it has been argued that if specific performance is decreed, the Defendant is entitled to be reimbursed on account of the money spent by him for the improvement of the property after his purchase.

The first question for consideration is whether specific performance should be allowed in this case. As already stated, the contract was to be performed within three months from the 22nd April 1910. The second Defendant purchased the property after the expiration of the three months and his case is that although, as evidence shows, the transferee was aware of the

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prior contract, the prior contract had ceased to be operative upon the expiry of the time limited for its performance. To determine whether the contract with the Plaintiff was in force on the day when the property was transferred to the second Defendant, we have to consider what had happened between the 22nd April 1910 and the 30th August 1910. Under the contract the vendor had agreed to satisfy the purchaser that "she had a valid saleable interest in the property by showing him a copy of the order of the Collector about the registration of her name in respect of the property, the Will of her mother Brahmamoyee and other papers relating thereto". On the 15th July 1910 a letter was addressed on behalf of the Plaintiff to the first Defendant in which it was pointed out that nothing had been done up to that time towards the performance of the contract, and it was stated that as it would be necessary to examine the title to the property and to draft a conveyance, the title-deeds should be sent immediately. A second letter was addressed on behalf of the Plaintiff to the first Defendant on the 21st July 1910, that is, on the day previous to that fixed as the latest day for the performance of the agreement. In this letter it was stated that the documents relating to the property had not yet been shown, nor had the Plaintiff been informed as to whether the vendor had registered her name in the Collectorate, but that the Plaintiff was ready with the purchase money and was anxious to examine the documents of title. On the 26th July 1910 Babu Annada Prosad Banerjee, Pleader for the first Defendant, wrote a letter to the Plaintiff in which he stated that his client had got her name registered in the Collectorate, and that the copy of the order of the Collector and other title-deeds relating to her title had been shown to the Plaintiff, but that the Plaintiff had delayed to pay the balance of the consideration money and to get a conveyance executed by her. The letter concluded with the statement that unless within 7 days from the date thereof the balance of the consideration money was paid and a conveyance executed, the land would be transferred at the choice of the vendor and the earnest money would be forfeited. Three days later on the 29th July a reply was sent to this letter on behalf of the Plaintiff in which he alleged that the title-deeds had not been shown to him. There was subsequently a letter, dated the 12th August 1910, in which the Plaintiff complained that the time for the performance of the contract had already expired, and that the vendor had done nothing to complete the transaction, with the result that no other course was left open to the purchaser than to seek the protection of the Court. On the 2nd September 1910 another letter was sent on behalf of the Plaintiff to the first Defendant in which it was stated that although after repeated demands some of the title-deeds had been produced as also a draft copy of the Will alleged to have been executed by her mother, neither an attested copy of the Will nor the probate had been shown to him. It is not disputed that the original Will was not shown by the vendor to the purchaser, nor was a certified copy thereof produced. It is also conceded that the probate with copy of the Will annexed was not shown to the purchaser for the reason explained in this Court, namely, that the probate had not been actually taken out, though the order for its issue had been made by the Probate Court. It is plain consequently that the vendor had not carried out one of the essential terms of the agreement, namely, to satisfy the purchaser as to her title to the property by production of the Will of

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her mother Brahmamoyee. It was suggested in the Court below that it was impossible for the vendor to carry out literally the terms of the agreement, because the alleged Will which she undertook to produce was in the custody of the Probate Court. This may be accepted as a true statement of the circumstances of the case. But it was plainly practicable for the vendor to do the next best thing, namely, to produce a certified copy of the Will. Consequently it cannot be held that the non-performance of the agreement within the three months prescribed thereby was attributable to any default on the part of the purchaser. The purchaser was entitled to insist upon the production of a certified copy of the Will, as that document constituted a very important and essential element in the investigation of the title. But it has been argued on behalf of the Respondents that the default on the part of the vendor was neither material nor essential, because a copy was produced of a compromise petition between the parties to the probate proceeding, and that the Plaintiff should have accepted that document in lieu of a certified copy of the Will. In our opinion there is no force in this contention, and the cases to which reference was made on behalf of the Respondents, namely, *Oxford* v. *Provand* (1) and *Lamare* v. *Dixon* (2) are clearly distinguishable. No doubt these cases draw a distinction between essential and non-essential terms of a contract. But in the case before us, it is impossible to hold that the production of the Will was a non-essential term of the agreement; nor can we hold that the Plaintiff was bound to have the title investigated on the basis of the petition of compromise filed in the probate proceeding. A question might well arise hereafter as to the validity of that compromise, and the Plaintiff was entitled to insist upon the production of the original or of a certified copy of the document which the Defendant had expressly undertaken to produce. Reference however was made to sec. 55, sub-sec. 1, cl. (*b*) of the Transfer of Property Act to establish the position that the seller is only bound to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power. But it was overlooked that this is subject to the introductory words of the section, namely, "in the absence of a contract to the contrary." The position, therefore, is well established that on the 22nd July 1910 the Plaintiff was not in default, that the contract was still enforceable at his instance and that if it remained unperformed, the vendor Defendant was responsible for the situation. This view is consistent with the fact that subsequently the vendor Defendant did call upon the Plaintiff to perform the contract within a period named. There is thus no escape from the position that on the 22nd July 1910 there was a valid and subsisting contract between the Plaintiff and the first Defendant which was enforceable at the instance of the Plaintiff. The subsequent transferee entered into an agreement to purchase the property with full knowledge of this prior agreement. He cannot consequently claim to be a *bonâ fide* purchaser for value without notice and the Plaintiff is entitled to have the contract specifically enforced not only against the vendor but also against the transferee.

But it has been contended that specific performance should be refused on the ground mentioned in sec. 22 of the Specific Relief Act which provides that the jurisdiction to decree specific performance is discretionary, and the Court is not bound

(1) L. R. 2 P. C. 135 (156) (1868).
(2) L. R. 6 H. L. 414 (422) (1873).

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to grant such relief merely because it is lawful to do so; the discretion of the Court, however, is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. It was argued for the Respondents with reference to the principle thus formulated, that there was delay in the institution of the suit, and that as before its commencement the transferee had spent money for the improvement of the property, the Plaintiff should not be allowed a decree for specific performance. We are of opinion that there is no force in this contention. The transfer to the third Defendant took place on the 30th August 1910, and the conveyance was registered on the following day. The suit was instituted on the 5th November 1910. The Court in which the suit could be instituted was closed from the 2nd October to the 3rd November. Can we under these circumstances hold that there was such delay in the institution of this suit as disentitled the Plaintiff to a decree for specific performance? Our attention has not been drawn to any case in which a delay of one month in the institution of a suit has been held sufficient to justify a refusal of relief by way of specific performance. On the other hand, there are instances in which a delay for a much longer period has not been considered sufficient. For instance in the case of *Marquis of Hertford* v. *Boors* (3), a delay of 14 months was not considered a bar to the Plaintiff's claim. In the case of *Eads* v. *Williams* (4), where the contract was for a lease of a coal-mine, a delay of 3 years and-a-half was considered fatal. In *Southcomb* v. *Bishop of Exeter* (5), a delay of about eighteen months was held to have the same effect and in *Lord James Stuart* v. *London and North-Western Railway Company* (6), a delay of twenty-one months was considered fatal to the bill for specific performance. The shortest period which has been considered fatal is a delay of 3 months and 13 days as happened in the case of *Glasbrook* v. *Richardson* (7). We cannot possibly give effect to the contention that the present suit was instituted with undue delay.

It has finally been contended that specific performance should be refused, because in the terms of sec. 22, sub-sec. 12, of the Specific Relief Act the performance of the contract would involve hardship on the purchaser Defendant which he did not foresee, whereas its non-performance would involve no such hardship on the Plaintiff. There is clearly no force in this contention. This clause clearly contemplates a case in which the vendor has entered into a contract without full knowledge of the circumstances. Instances of cases may be found in the books, where it has been held that mere improvidence or inadequacy is no hardship within the meaning of the rule, but that the bargain must be so hard as to be unconscionable, so that its actual performance would in the circumstances be inequitable. But where the hardship had been brought upon the Defendant by himself, the Court will not consider that as a circumstance in favour of the refusal of specific performance. On the merits of the case we consequently hold that the Plaintiff is entitled to a decree for specific performance.

The only other question which requires consideration is, whether the Defendant is entitled to be reimbursed for the improvement that he has effected on the property. The case for the Defendant is

(3) 5 Ves. 719 (1800).
(4) 4 DeG. M & G. 674 (1854).
(5) 6 Hare 213 (1847).
(6) 1 DeG. M. & G. 721 (1852).
(7) 23 W. R. Eng. 51 (1874).

that Rs. 900 has been spent in repairs, and it has been argued that it would be unjust to allow the Plaintiff to reap the benefit of this expenditure. In support of this contention, our attention has been invited to a passage from Dart on Vendors, Vol. II, page 944, which, however, is of no assistance to the Respondents: "Where a purchaser for value is evicted in equity under a prior title, he will be credited with all money expended by him in necessary repairs or permanent improvement": *Mill* v. *Hill* (8). But this rule does not apply where the improvements have been made after he has discovered the defect in title: *Kenny* v. *Brown* (9), *Clare Hall* v. *Harding* (10), and *Monro* v. *Taylor* (11). In the case before us, what is the position of the parties? The transferee had notice of the prior agreement; but he alleges that he assumed that as the three months allowed for its performance had expired, the contract had ceased to be operative. The assumption was obviously erroneous, because even after the expiry of the time prescribed for the performance of an agreement, it may still be enforceable under various circumstances, for instance, if time is not of the essence of the contract, or if the time has been extended, or if the party, who is entitled to repudiate the contract by reason of the default of the opposite party, chooses to waive the breach and seeks to enforce the contract. On the other hand, the transferee, if his allegation is assumed to be true, with full knowledge of the prior contract, did not take any steps to communicate with the Plaintiff. In this view there was an omission of enquiry which any prudent man under the circumstances would have made. We cannot consequently hold that the Defendant is the victim of an honest mistake. He has deliberately omitted to make an enquiry which could have afforded him protection. But it is worthy of note that the case for the Plaintiff is that the Defendant was actually warned by him not to purchase the property. This was found as a fact by the Subordinate Judge who concluded, upon the evidence, that the Defendant had been forbidden to purchase the property in view of the previous engagement with the Plaintiff. This in fact was stated by Babu Annada Prosad Banerjee, the pleader for the first Defendant who was examined as a witness by the Plaintiff; the statement was made in the examination-in-chief and the witness adhered to it in the cross-examination. The District Judge has not negatived the finding of the Subordinate Judge that the Plaintiff had forbidden the Defendant to purchase the property. If this be taken to be the true state of facts, what is the position of the Defendants? They have entered into the transaction with their eyes open. They have acted on the assumption of risk, and a person who entertains a doubt as to the existence, present or future, of a certain fact, cannot be said to be the victim of an honest mistake. The view we have taken is supported by the principles explained by this Court in the case of *Kandarpanath Ghose* v. *Jogendranath Bose* (12). The position of the Defendant who has taken with notice of the prior contract and who has omitted to make an effective enquiry from the Plaintiff is no better than that of the vendor himself, and so far as the vendor is concerned, it is clear that if he makes permanent improvements, the purchaser would be entitled to the benefit thereof without further payment [See *Clare Hall*

(8) 3 H. L. [illegible]. 828 (1852).
(9) 3 Ridhway P. C. 498 (518).
(10) 6 Hare 278 (1848).
(11) 8 Hare 51 (60) (1850).

(12) 12 C. L. J. 391 (1910).

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v. *Harding* (10), *Monro* v. *Taylor* (11)]. The Defendants consequently have not established any right to be reimbursed for the improvement made on the property. They have not shown that the improvement was needed. On the other hand, the fact that the money spent on the improvement was sixty per cent. of the value of the house would tend to throw doubt as to the wisdom of the course adopted by them.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of appeal below.

We are informed that the balance of the purchase money was deposited by the Plaintiff in Court pursuant to the order of the Court of first instance. The order of that Court with regard to the execution of the conveyance will now be carried out. We further direct that as soon as the conveyance is executed, the Plaintiff be placed in possession of the property as against the Defendants in execution of the decree of this Court.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION]

RULE NO. 947 OF 1913.

FLETCHER, J.	THE EAST INDIAN RAILWAY CO., Defendants, Petitioners,
N. R. CHATTERJEA, J.	*v.*
1913,	NILKANTA ROY, Plaintiff, Opposite Party.
17, November.	

Railway, despatch of goods by—Risk-note H—Loss—Suit for damages—Onus of proof—"Complete packages," tins delivered, but contents missing, if.

It is for the consignee of goods despatched by railway under a risk-note to prove that the case is within one of the exceptions provided in the note, viz., *wilful neglect of the company's servants or theft by or wilful neglect of its servants, transport agents or carriers employed by them; and in the absence of proof that the loss was caused by one of the risks undertaken by the owner, the Court is not bound to presume that the loss was due to one of the reasons covered by the exception.*

SHEOBARUT RAM *v.* THE BENGAL AND NORTH-WESTERN RAILWAY COMPANY (1), *followed.*

When the tins in which oil was despatched by railway were delivered, though the contents were missing :

Held—*That there was no loss of " complete packages " within the meaning of the note.*

This was a Rule granted on the 4th July 1913 against an order of Babu Umesh Chandra Sen, Small Cause Court Judge of Burdwan, dated the 30th April 1913, in a suit for recovery of Rs. 31-8 as price for four tins of mustard oil lost in course of transit from Bhagalpur to Plaintiff at Burdwan out of 242 tins consigned. The Munsif decreed the suit with costs. The Company thereupon moved the High Court and obtained this Rule.

Babus Mohendra Nath Roy and *Ambicapada Choudhury* for the Petitioners.

Babu Rishendra Nath Sarkar for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

FLETCHEER, J.—This is a Rule obtained by the East Indian Railway Company in a suit which was brought against them as Defendants by one Nilkanta Roy in the Provincial Small Cause Court at Burdwan to recover damages for failure to deliver certain tins of mustard oil which had been

(10) 6 Hare 278 (1848).
(11) 8 Hare 51 (60) (1850).
(1) 16 C. W. N. 766 (1912).

consigned from Bhagalpur to Burdwan for delivery to the Plaintiff. The tins of mustard oil consigned to the Defendants were 242 in number. Out of these, 238 tins admittedly were properly delivered to the Plaintiff; but the other four tins were not taken delivery of by the Plaintiff, because these tins had been cut open and the contents were missing. The goods were consigned to the Defendants under a risk-note which is known as Form H. That risk-note is made under the provisions of sec. 72 of the Indian Railways Act (IX of 1890), and in accordance with the terms of that Act, it has received the approval of the Governor-General in Council. The note provides that the owner should undertake "to hold the Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of or damage to all or any of such consignments from any cause whatsoever except for loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants, transport-agent or carriers employed by them." Now, the learned Munsif who tried the case in the Court of first instance held that the onus of proving the loss fell upon the Railway Company and that in the absence of any proof that the loss was caused by one of the risks undertaken by the owner under the risk-note, the Court was bound to presume that the goods were lost under one of the reasons covered by the exception to the risk-note. In that view, the learned Munsif was, in my opinion, clearly wrong. There is a decision of this Court [*Sheobarut Ram* v. *The Bengal and North-Western Railway Company*. (1)]. That was a decision of Mr. Justice Harington and Mr. Justice Caspersz. It is true that the decision in that case did not turn upon the risk-note, Form "H", but upon another risk-note known as Form "B"; but, for the purposes of the present case, the wording of the risk-note (Form B) is identical with the wording of risk-note (Form H). In my opinion, we are bound to follow the decision in *Sheobarut Ram* v. *The Bengal and North-Western Railway Company* (1), and if I may be permitted to say so, I think that that decision is quite correct, and that, upon the construction put on this risk-note, it must be held that the person who says that the case falls within the exception has to prove that when the case comes on for trial. Besides that, there is another decision to which the learned Vakil for the Railway Company has called our attention, namely, the case of *The Bombay, Baroda and Central India Railway Company* v. *Ambalal Sewaklal and others* reported at p. 48 in a re-print of certain Railway cases which is known as the High Court Decisions of the Indian Railway Cases. That is a decision of the High Court at Bombay, Sir Basil Scott, C. J., and Mr. Justice Batchelor being the Judges who gave the decision. That again is a case turning on the risk-note, Form B; but, for all material purposes, the risk-note, Form B, is the same as the risk-note, Form H, and the facts of that case are almost the same as the facts of the present case. The question raised there was whether there had been loss of a complete package, and the learned Judges held that, as the tins forming the separate packages in the consignment were delivered to the consignee, there was no loss of any complete package and, therefore, the Railway Company could not be held liable. That is exactly what happened in this case. The tins were delivered to the

(1) 16 C. W. N. 766 (1912).

(1) 16 C. W. N. 766 (1912).

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Contents.

NOTES.

Income and Expenditure of the High Court of England.

The following figures showing the receipts and expenditure of the High Court of England will be found of interest in this country. The total receipts during the past financial year amounted to £489,778 and the expenditure to £653,313. Thus the deficit amounted to £163,535. The deficit is justified, on the ground, amongst others, that the Judges and officials devote a large part of their time to Crown and criminal work with which civil litigants have no concern. In India the High Courts also work at a deficit. But if allowance is made for Crown and criminal work, the deficits would be negligible. Then one may take into consideration the surplus that civil litigation in the subordinate Courts yields which in Bengal alone exceeds half-a-crore of rupees annually.

Freedom of the Suez Canal.

We have explained in these columns the international position of the Suez Canal and we are glad to find that our view is entirely in accord with the view taken by our legal contemporaries in England. The *English Law Journal* to hand by the last mail reviews the position of the Canal in almost identical terms and in doing so makes the following observations :—

Turkey's place, however, as the territorial Sovereign of the country through which the Canal is cut, has been taken by England in virtue of her protecting function in Egypt, and it is to the English fleet and the English army now, as in 1883, at the time of the Arabi rising, that the defence of the high way of nations is entrusted * * * * As the Agents of the Powers in Cairo, who are the chosen Council for the protection of the Canal in the time of emergency, confirmed England's right to take exceptional steps against the danger that lay in the ports, so now, doubtless, they will confirm our right to ward off by all possible means the danger that moves from the Desert.

After reciting the main provisions of the Convention of Constantinople of 1888, further ratified by Great Britain in 1904, our legal contemporary quotes the weighty opinion of the late Professor Westlake regarding them that "they do not prevent the power which is best able to safeguard the freedom of the Canal from taking any measure necessary to that end, even if they are not in accordance with the provisions."

High traditions of the French Bar in the 14th Century.

The following Rules indicating the high professional standard attained by French lawyers in the fourteenth century can be gathered from Bouteiller's *Somme Rurale* (written in 1360). The French Bar, it must be remembered, at that time and until the Revolution constituted a lesser order of nobility known as the ***noblesse de la robe***, with all the rights and privileges of a noble order (Forsyth's Hortensius, pp. 213-215). This position could have hardly been attained and acquiesced in if the standard of honour, as testified by these rules, had not been ordinarily observed in the practice of law.

The Rules were :—

"1. He was not to undertake just and unjust

causes alike without distinction, nor maintain such as he undertook with trickery, fallacies and misquotations of authorities.

"2. He was not, in his pleadings, to indulge in abuse of the opposite party, or his counsel.

"3. He was not to compromise the interest of his client, by absence from Court, when the cause in which he was retained, was called.

"4. He was not to violate the respect due to the Court, by either improper expressions or unbecoming gestures

"5. He was not to exhibit a sordid avidity of gain by putting too high a price upon his services.

"6. He was not to make any bargain with his client for a share in the fruits of the judgment he might recover

"7. He was not to lead a dissipated life or one contrary to the modesty and gravity of his calling

"8. He was not, under pain of being disbarred, to refuse his services to the indigent and oppressed."

The best traditions of English Bar even to-day do not put the standard of professional conduct any higher. In fact we all would do well to emulate the code of honour that prevailed in France in the 11th Century.

COPY-RIGHT IN MOTOR-HORN MUSIC

The motor-car has so often been described by angry or envious pedestrians as "road-hogs," that it is possible that the term has ceased to stand for anything else but motor cars The passing motor-car can be heard, and we believe it is under a legal obligation to make itself heard from some distance. But we cannot say that personally we have ever heard it grunt as hogs do The species is, however, certainly known to announce itself to the unwary by, amongst others, a variety of animal voices. Some bray like the ass, others affect the ululation of less musical living creatures, notably the calf. One class would even seek to parody the strains of musical instruments To reproduce all the varieties of warning notes uttered by the motor-car would tax the powers of the most skilled polyphonist But the question with which we are concerned is whether by so doing the adventurous exhibitor of motor-voices would lay himself open to an action for breach of patent or copy-right or both.

We have had little to do with the law of patents in India, but the law of copy-right does sometimes come in for consideration by our law Courts From our familiarity of the last mentioned subject we may state that "every man who wrote a book, poem or any other original composition had at Common law the exclusive right of multiplying copies of it so long as it remained unpublished; but by a statute of Anne authors acquired a further exclusive right of multiplying copies of their works for a number of years (extended in duration by later statutes) after publication." Authors of dramatic or musical compositions, if reduced in book form, had and have under these statutes the exclusive right of multiplying copies of these for a number of years. Neither the Common law nor these statutes recognised or protected the right of the author of a dramatic piece or musical composition of exclusive representation or performance in public. Copy-right with regard to dramatic compositions was secured by a statute of 1833, 3 Will, IV, C. 15, and with regard to musical compositions, by 5 and 6 Vic., C. 45, sec. 20. This was the first instance in English legal history of the recognition of a copy-right in sound-production.

In our youth, we have all envied boys who, by a simple manipulation of their prehensiles and their mouths, could produce a variety of ingenious sounds, but we never came to grief over attempted infringements of copy-right in those sounds, in spite of the provisions of the Victorian Statute. We have also searched in vain in the pages of the Law Reports for an authority on the point.

One thing, however, is beyond doubt that the sounds produced by the motor-horns are imitations and, almost without exception, bad ones. They are certainly lacking in originality. The designers of motor-horns which whistle, bellow, bray, bleat or neigh, or try to sing a musical strain are after all plagiarists But some inventors across the ocean have put forward the pretension that they are protected as "musical compositions" under the International Copy-right Act. But if they were really so, they would, so far from warning pedestrians off their track, be luring them on to destruction But, however musical motor-horns may sound in the ears of their inventors, by the public at large they are regarded as unmitigated noise, which they reluctantly tolerate for reasons of personal safety

We will have no quarrel with the inventors, if they seek to protect motor-horns as patents The law of patent might, perhaps, protect their inventions as mechanical devices—emitting sounds, of which men and animals alike would fight shy But all the same the lay public will be quite at one with the learned American Judges of the United States Circuit Court of Appeals who, in discussing the merits and demerits of a patented automobile horn, on which, it was alleged, infringements had been made, said that a "rachet wheel revolving on the up-turned bottom of a tin-pan would produce a somewhat similar result," and wound up by holding that "a noise is not patentable." (*Vide* the Canadian Law Times for August 1914, p. 721.)

CURRENT INDIAN CASES.

(CIVIL.)

Guardians and Wards Act.

SUBHAG SING *v.* RAGHUNANDAN SING, I. L. R. 36 All. 282.

Three persons applied to be appointed guardian of a minor. The District Judge asked the Collector of the District whether he was inclined to take the property of the minor under the management of the Court of Wards, and, if not, to say which of the three persons was the fittest for appointment The Collector called for a report from the Girdawar Qanungo who reported in favour of one who was appointed by the Judge without taking any further evidence in the case.

Held—That the report of the qanungo cannot be treated in law as evidence in the case and the Judge should have called upon the different

claimants to give evidence and should have decided on that evidence.

Contract Act, secs. 102, 103—Transfer of Property Act, sec. 137.

AMIR CHAND v. RAMDAS, I. L. R. 38 Bom. 255.

The Appellant was an endorsee of a Railway receipt from the firm of C who purchased some cotton bales mentioned in a receipt from R. C having become insolvent, R as unpaid vendor stopped the cotton in the hands of the Bombay Steam Navigation Company before it had been delivered to the endorsee.

Held—That sections 102 and 103 are the only sections of the Contract Act which refer to assignment of documents of title, and sec. 137 of the Transfer of Property Act which must be taken as part of the Contract Act occurs in the chapter relating to the assignment of claims and the Appellant was entitled to the benefit of sec. 103 of the Contract Act against the unpaid vendor.

Cantonments Act (III of 1880), sec. 22.

SECRETARY OF STATE FOR INDIA v. MAJOR HUGHES, I. L. R. 38 Bom. 293.

The Plaintiff instituted a suit to recover payment of the amount of taxes levied by the Cantonment authorities at Poona which the Plaintiffs paid under protest on the ground that the assessment was illegal.

Held—That the case was one in which the jurisdiction of the Civil Courts was not ousted.

That when a taxing authority is called upon to assess the tax based upon annual letting value, he does very wrong if he rates as if he were dealing with the question for the income-tax.

Evidence Act, sec. 41—Judgment refusing probate of will.

KALYAN CHAND v. SITABAI, I. L. R. 38 Bom. 309 (F. B.).

The executors applied for the probate of a will. The widow of the testator who was then a minor entered caveat and probate was refused. An appeal to the High Court was dismissed and probate refused by that Court also. On coming of age the widow brought a suit against the executors who again set up the will.

Held—That sec. 41 of the Evidence Act was not applicable to the judgment of the Appellate Court. The finding of a Court that an attempted proof has failed is not a judgment such as is contemplated in that section. The only kind of negative judgment which is contemplated is that which expressly takes away from a person legal character which has up to that time subsisted. That is not the case with the judgment in question here.

That the judgment of the Appellate Court that the testator was not of sound disposing mind when the alleged will was made was *res judicata* between the parties in the present litigation.

Civil Procedure Code, sec. 97—Preliminary decree.

KALURAM v. GANGARAM, I. L. R. 38 Bom. 331.

The Plaintiff brought a suit for an account and for recovery of the balance due by the Defendant. Several issues relating to the agreement between the parties, interest and other details were raised by the Trial Court which after recording findings on these issues ordered accounts to be settled as per findings arrived at by the Court. A Commissioner was appointed and the Court accepted the Commissioner's report and dismissed the suit. The Plaintiff appealed to the District Court against the final decree and urged objections to the findings recorded by the Trial Court in accordance with which the account was taken between the parties.

Held—That under the Code the right to appeal arises when there is a decree, i.e., when there is a formal expression of the adjudication. There is no right to appeal from any preliminary judgment as in this case, where no preliminary decree was drawn up in pursuance of the interlocutory judgment in accordance with which accounts were ordered to be settled. The obligation to appeal contemplated by sec. 97 of the Code arises when the right to appeal accrues and not before that. In the absence of any preliminary decree the party appealing against the final decree would have a right to object to findings which may have been recorded in the preliminary judgment

Easement—Right to water of a stream.

Y. ADINARAYANA v. RAMUDU, I. L. R. 37 Mad. 304.

No claim can be made either as a natural right or as an easement by prescription except to water flowing in a definite course and no such claim could be maintained with regard to what should be regarded as surface water or surface drainage in the proper acceptation of those expressions. If this principle be understood correctly, it cannot be held that the right to the water of a stream ceases when it ceases to flow in a confined water course.

Execution proceedings—Res judicata.

VYAPURI v. A. C. CHIDAMBARA MUDALIAR, I. L. R. 37 Mad. 314

In an application for execution of a decree the decree-holder calculated the amount due to him in a manner which showed it to be much larger than the figure arrived at by the method of calculation adopted in former applications for execution of the same decree. The Court without issuing notice to the Defendants held that the decree-holder was not entitled to the larger amount and returned his application with the direction that he should amend the amount due to him in accordance with the mode of calculation previously adopted by him. The decree-holder did not appeal against this order, nor did he obey the direction to amend his petition which was rejected. He put in a fresh application for execution after the expiration of the period allowed for amendment, but before the previous application was rejected. In this application he calculated the amount on the same basis as in the last.

Held—That the order of the Court on the last application that the decree-holder was not entitled to claim a larger amount on a new basis barred the contention that he was entitled to do so.

Contract Act, sec. 28.

BARODA SPINNING COY. v. SATYENARAIN INSURANCE COY., I. L. R. 38 Bom. 344.

Sec. 28 of the Contract Act is aimed only at covenants not to sue at any time and covenants not to sue for a limited time.

The phrase "thus enforce his rights" in sec. 28 refers to the enforcement "by the usual legal proceedings in the ordinary tribunals."

Presidency Towns Insolvency Act, sec. 17.

B. N. LANG v. HEPTULLABHAI, I. L. R. 38 Bom. 359.

Sec. 17, which is taken *verbatim* from sec. 9 of the English Bankruptcy Act (1883), does and is intended to save all the rights of secured creditors as they existed and was enforceable before the passing of that Act.

Transfer of Property Act—Equitable mortgage.

BEHRAM v. SORABJI, I. L. R. 38 Bom. 372.

An equitable mortgage under sec. 59 of the Transfer of Property Act needs three facts to be proved (1) a debt, (2) deposit of title deeds and (3) an intention that the latter should be security for the former

Civil Procedure Code, r. V, Or. V.

TULGARAM v. SITARAM, I. L. R. 38 Bom. 377.

In a mortgage suit the summons should issue in the first instance only for the settlement of issues and not for final disposal

Injunction.

RASUL v. PERUBHAI, I. L. R. 38 Bom. 381.

The Court's power to grant a mandatory injunction on an interlocutory application should be exercised with great caution and in strict conformity with the provisions of the Civil Procedure Code

Civil Procedure Code—Review.

NARAYAN v. LAXMIBAI, I. L. R. 38 Bom. 416.

There is no reason why an application for review properly filed should not be disposed of on the merits merely because an appeal has subsequently been filed in a higher Court.

Privy Council—Leave to appeal.

REVANSHIDAPPA v. MASSESHAPPA, I. L. R. 38 Bom. 421.

A judgment or order in order to be final within the meaning of cl. 39 of the Letters Patent must finally determine the rights of the parties. An order by the High Court rejecting an application by a person claiming to be the legal representative of a deceased party to a pending appeal for having his name brought on the record is not a final order.

Hindu Law—Succession.

HARI v. VASUDEV, I. L. R. 38 Bom. 438.

Under the Mitakshara a full sister comes next after the grandmother and *a fortiori* after the half-brother's son.

Civil Procedure Code—Cause of Action.

KASHINATH v. NATHOO, I. L. R. 38 Bom. 444.

The cause of action upon which the Plaintiff may base various claims in one suit under Or. II, r. 2, does not depend upon the character of the relief for which he prays. It refers to the Media upon which the Plaintiff asks the Court to arrive at a conclusion in his favour to every fact which it would be necessary for the Plaintiff to prove in order to support his right to the judgment of the Court.

Adverse possession—Trustee, possession by.

PRAMATHAN v. CHOORAKKAPATTI, I. L. R. 37 Mad. 373.

When a person purports to hold the property as a trustee he cannot by such possession acquire a right to the property by prescription for himself against the beneficiaries. In determining what right adverse possession would confer on the holder the *animus possidendi* is the decisive factor. The character in which possession is held must determine the right which the possession would confer.

Limitation Act (IX of 1908), Art. 49.

N. K. SANKUNNI v. N. R. GOBINDA, I. L. R. 37 Mad. 381.

Specific property is property which is recovered in specie, *i.e.*, the very property itself,—not any equivalent substitute or reparation.

Money comes within the phrase "moveable property" in Art. 89, but it cannot come within the phrase "specific moveable property" in Art 49

Agreement prohibited by law.

MOTTAI REDDY v. THANAPPA REDDY, I. L. R. 37 Mad 385.

The accused persons in a criminal case who were charged with grievous hurt to a person who had died previous to the complaint executed a promissory note as consideration for compounding the case.

Held—That the offence could not have been legally compromised except with the consent of the person to whom grievous hurt was caused, and the agreement to compound was therefore one prohibited by law.

Specific Relief Act, sec. 15.

I. NAGIAH v. A. VENKATARAMA, I. L. R. 37 Mad. 387

Sec. 15 of the Specific Relief Act applies where a member of an undivided family agrees to sell part of the joint property in which he has only a share. The consideration that an undivided father has an interest in every part of the undivided property in no way takes the case out of the operation of the section.

Transaction by a minor.

MUNIA KONAN v. PERUMAL KONAN, I. L. R. 37 Mad. 390

In all cases where a transaction by a minor has been held to be void, the essential fact which rendered it void was that some agreement by the minor

was necessarily an essential part of the transaction.

If there are obligations enforceable against the property purchased, the property in the hands of the minor would be liable for the satisfaction of such obligations.

Contract opposed to public policy.

DEVARAYAN v. MATTURAMAN, I. L. R. 37 Mad. 393.

An agreement between A and B that B's daughter shall marry A's son and that if she fails to do, B shall pay a sum of money to A is contrary to public policy.

Hindu Law—Daughter-in-law's right to maintenance.

MEENAKSHI v. P. RAMA AYAR, I. L. R. 37 Mad. 396.

A Hindu is not bound to maintain his daughter-in-law if possessed only of property acquired by himself. The rules of Hindu Law are binding on the Court only where it is necessary to decide "any question regarding succession, inheritance, marriage, or caste or any religious usage or institution." Where maintenance is claimed against a person not on the ground that the property coming by inheritance to him is burdened with the maintenance of the person claiming it, but on the ground that the Hindu law-givers have placed such duty on the Defendant, the Hindu Law as such has no obligatory force.

Mahomedan Law—Khoja Mahomedans.

JAN MAHOMED v. DATU, I. L. R. 38 Bom. 449.

Where Mahomedans are concerned, the invariable and general presumption is that they are governed by the Mahomedan Law and usage. It lies on a party setting up a custom in derogation of that law to prove it strictly.

But in matters of simple succession and inheritance it is to be taken as established that succession and inheritance among Khojas and Memons are governed by the Hindu Law as applied to separate and self-acquired property.

Kazis' Act (XII of 1880).

KATIL SHEIKH v. KHAZI BUDAN, I. L. R. 37 Mad. 28.

Sec. 4 shows that an appointment under the Act does not confer on the appointee any exclusive franchise or any exclusive right to officiate at marriages.

Civil Procedure Code—Execution of decree.

MAHARAJA OF POBILI v. SREE RAJA NARASANGU DEO, I. L. R. 37 Mad. 231.

The Court to which a decree is sent for execution is the Court having seisin of the execution proceedings and it is bound to carry them on until execution is obtained or further execution becomes impossible.

Legal Practitioners' Act—Professional misconduct.

MUNI REDDI v. K. VENKATA ROW, I. L. R. 37 Mad. 38 (F. B.).

Purchase of an actionable claim by a pleader is professional misconduct punishable under sec. 13 of the Act.

Reviews.

The Law of Transfer in British India. By H. S. Gour, M.A., D.C.L., LL.D. Vol. I. Fourth Edition. Calcutta: Thacker Spink & Co. 1914. Price Rs. 10.

Dr. Gour's commentaries are nothing if not thorough and the appreciation which his commentaries on the Transfer of Property Act have received in the hands of practising lawyers in this country and of which the best practical demonstration is offered by a fourth edition being called for within the space of 14 years is quite commensurate with their merits. Of the volume under notice it need now only be said that it has been revised and brought up to date, and for convenience of use and reference, the texts of the Regulation of 1806, the Transfer of Property Act and Or. 34 of the Civil Procedure Code, a separate Table of Cases and Topical Index for the volume have been added, thus materially increasing its size. We are not sure the Regulation and Order 34 of the Civil Procedure Code would not have more suitably found a place in the second volume in which the portion of the Act dealing with mortgages will be dealt with, the present volume reaching only up to the end of the Chapter on Sales. This however is hardly a matter of any consequence. We feel sure after such examination of the volume as we have been able to make, that the position which the book has already secured in the estimation of lawyers will be fully maintained by the present edition.

Legal Maxims. As illustrated in Decided Cases and Legislative Enactments in India. By Upendra Gopal Mitter, B. L., Vakil, High Court, Calcutta. Edited by T. V. Sanjiva Row. Published by T. A. Venkasawmy Row and T. S. Krishnaswamy Row, Law Printing House, Madras. 1914.

This is evidently a work upon which the author has expended a great deal of patient industry and research. It is not a mere collection of Latin maxims cited in judicial decisions in this country with references and explanatory notes. Following his English exemplars the author has tried to explain and illustrate well settled principles of law and practice which have been adopted and applied in deciding Indian cases, the legal maxims in question offering themselves as nuclei round which the discussion has centred. Legal principles well established though not answering any well known Latin maxim too have not been passed over and Sanskrit maxims also have not been overlooked. We have no doubt, the book which covers nearly 900 pages will prove useful.

Stephen's Commentaries on the Laws of England. Sixteenth Edition under the general editorship of Edward Jenks, M. A., B. C. L. In four volumes. Butterworth & Co., London, Sydney, Calcutta and Winnipeg. 1914.

The last edition of this work appeared so recently as 1908, and the changes made in the law since have been so numerous, that the Editors have found it necessary to overhaul and in parts to rewrite the book, and opportunity has been taken at the same time to effect considerable re-

arrangements which experience has shown to be necessary in the interests of students and practitioners. In volume I, the chapters on Title by Alienation and Death Duties on Land have been rewritten; in Volume II, the provisions of the National Insurance Acts of 1911 and 1913, amongst others, in so far as they affect the relation of master and servant, have been noted; in Vol. III, the chapter dealing with the Privy Council has been so expanded as to enable readers to form a more life-like idea of it as a working (and not merely as a legal) institution. The new Chapter on "The Non-Conformist Churches" has wrested a place in this general account of the Laws of England not too soon. The results of the large body of Social Legislation which has followed the advent of the Liberal Party into power have been accurately summed up and incorporated in their proper places. The part dealing with "Civil Injuries" has undergone re-arrangements, but not, it strikes us, to the extent needed. The rest of the work has similarly been brought up to date Blackstone's language, where retained, is, as in former editions, shewn by square brackets. Being still the best student's compendium of the Laws of England, this new edition of the work will not fail to be welcome to students, and practitioners also will with pleasure turn to it for the best and most up-to-date general statements of the prevalent Law of England on any of its not easily assortable varieties of topics.

Roman Law. By I. L. Jaini, M. A., Calcutta Butterworth & Co (India), Ltd 1914.

This is a summary of the Institutes of Roman Law intended to assist students to get up the text of Justinian's institutes for examination purposes. The chief merit of this summary is that it does not profess to be a substitute, nor will it do duty for the text and will yield benefit only if used for purposes of revision.

The Law relating to Hindu Wills including the Hindu Wills Act and the Probate and Administraction Act. By Arthur Phillips, M. A., and Sir Ernest John Trevelyan, D. C. L. Second edition revised by Sir Ernest John Trevelyan. London: W. Thacker & Co, 2, Creed Lane, E C Calcutta Thacker, Spink & Co. 1914 Price Rs. 16.

A new edition of this scholarly text-book has been long overdue, for the first edition appeared in 1901. So far as legislation is concerned, the law applying to Hindu Wills has not changed since, but the existing law has been frequently interpreted and applied in decided cases and quite a number of decisions have been reported concerning interpretation of Wills. The accumulation of materials has in fact been sufficiently large to admit of the subject being treated in the present edition on somewhat similar lines to those which have contributed so materially to the success of the present editor's Commentaries on Hindu Law. Cases in the present edition are not cited at length but the principles determined in them are enunciated and then illustrated by references to decided cases. Less discursive, the present edition is better adapted for use by practitioners than its predecessor The earlier chapters however show not merely a change of method but in some respects of views also. The book had evidently been completed in 1913—the date of the preface, and is quite up to date to that point. It in fact supplements and completes the series of sound and well considered treatises on Hindu Law which the profession owes to Sir Ernest Trevelyan.

The Provincial Insolvency Act (III of 1907). By Mahim Chandra Sarkar. Rai M. C. Sarkar Bahadur & Sons, 75-1-1 Harrison Road, Calcutta. 1914.

The author rightly says that the subject of this book is not very familiar to judges and practitioners in the Mofussil Courts, and it is common experience that the provisions of the Insolvency sections of the Civil Procedure Code of 1882 are confounded with those of the present Act which not only covers far wider grounds but proceeds in some respects upon a quite different view of the rights and obligations of the insolvent than the provisions of Chapter XX of Act XIV of 1882. The object of the book, the auther explains, is to make clear the difference and at the same time to annotate and explain the provisions of the Act. For this purpose decisions of the Indian Courts, Chief Courts and Judicial Commiss'oners' Courts as also leading English cases when relevant have been relied upon. The cases reported up to the end of September 1914 are incorporated in the notes. Besides the Notes, there are an Introduction, the Statement of Objects and Reasons, Rules of the Calcutta and Madras High Courts under the Act and a Digest of Cases under Chapter XX of Act XIV of 1882, arranged according to subject-matter. On the whole it is a very satisfactory compilation prepared with the author's usual care and practical insight into what is required by judges and practitioners in dealing with cases under the Act

The Bench and Bar Diary, 1915. Compiled and prepared by the late M. N. Banerjee, B. L. Revised by S. N Banerjee, Bar.-at-Law and B. Banerjee, Pleader. Rai M. C. Sarkar Bahadur and Sons, 75-1-1 Harrison Road, Calcutta. Re. 1.

This Diary has been in use for some years, and besides the date pages, embodies a mass of information as to Court Fees, Process Fees, Limitation, Registration, Stamps and other legal matters, some model Forms and Petitions, and other matters of general interest such as usually form part of Diaries. In the date-pages are given corresponding Bengalee, Sumvat, Faslee, Hizri, Burmese and Telegu dates and there is besides a comparative Chronological Table for the years 1901-1911 A D., a 200 years' Calendar and a list of Holidays. The Diary is handy.

Students' Hand-book of the Transfer of Property Act. By I K. Yajnik, B.A., LL.B., High Court Pleader. N. M Tripathy & Co., Bombay.

The above is intended to be a guide to law students preparing for their examinations. The special points in each section of the Act are analysed and elucidated by reference to judicial decisions. The chief merit of the book seems to consist in the fact that it aims at helping the student

in getting a thorough hold of the subject instead of trying to obviate or rather aggravate his difficulty by acting as an inducement to cram.

The Current Statutes, 1913. Compiled by C. S. Somanatha Sastri, B.A., B.L., and P. Ramanatha Iyer, B.A., B.L., at the Lawyers' Companion Office, Trichinopoly. Published by the Law Printing House, Madras.

The above represents the third and fourth quarterly issues for the year 1913 of this useful compilation of legislative enactments relating to the whole of India, both Parliamentary and Indian, and rules and notifications made under them by the Government and the highest judicial tribunals of the land. The importance of such a publication to lawyers and to all who have to deal with law cannot be over-estimated and we have no doubt that its scope and usefulness will be duly appreciated by the legal profession. Among the Parliamentary enactments compiled in this issue the Appellate Jurisdiction Act making further provision, amongst others, with respect to the constitution of the Judicial Committee of the Privy Council will be found of general interest. The Indian Extradition Amendment Act, the Official Trustees Act, the Administrator-Generals Act, the Indian Companies Act, the Mussalman Wakf Validating Act are some among the more important Indian enactments embodied in this issue. The general arrangement and get-up of these quarterly issues are excellent.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before THE MASTER OF THE ROLLS and LORDS JUSTICES KENNEDY and SWINFEN EADY. **Allen v. Wedgwood.** 30th October 1914.

A trust for the protection of animals is a charitable trust.

A testatrix left the residue subject to a trust for the benefit and protection of animals in such manner as the legatee should think fit. It was contended for the Appellant that the trust could not be a charitable trust. The Court repelled the contention. The Master of the Rolls said:—

The terms of the trust were "for the protection of animals" or "for the protection and benefit of animals." The movement for the humane slaughtering of animals and the provision of municipal abattoirs were mentioned as the sort of purposes that the testatrix would have liked to have forwarded. The word "charity" had a much wider meaning in law than it had in popular speech. The Courts had held that the particular objects mentioned in the statute of Elizabeth, namely, (1) relief of the poor, (2) religion, (3) education, were not exhaustive. By analogy a large class of other objects had been included. Lord Macnaghten's judgment in Pemsel's case (1891, A. C., 531) was perhaps the leading authority. But he was content to adopt what was said by Lord Justice FitzGibbon in **Webb v. Oldfield** (1898, 1 I. R. 446):—

"Any gift which proceeds from a philanthropic or benevolent motive and which is intended to benefit an appreciably important class of our fellow-creatures, including animals, and which will confer the supposed benefit without contravening law or morals, will be charitable."

He thought that it was true that there had been a tendency to enlarge the meaning of the word "charity," and that gifts within the last 50 years had been supported as good charitable gifts which 150 years ago would not have been supported. In his opinion it was not possible to hold that the trust for the protection of animals was not a good charitable trust.

Messrs. Clauson, K. C, and Harman for the Appellant.

Mr. Austen-Cartmell in support of the trust.

B. D.

KING'S BENCH DIVISION.—Before MR. JUSTICE BAILHACHE. **Ingle v. Mannheim Insurance Co.** 29th October 1914.

A British subject's action is not suspended against a German Company carrying on business in England by reason of the War.

The Defendants, who formed a German Company with head office in Germany, issued in 1913 a policy of marine insurance to the Plaintiff. The loss occurred in August or September last before the Proclamation of October 8th. The Plaintiff sued, and by this summons applied that the action should be transferred to the Commercial Court for trial. The Defendants contended that the state of the war suspended the action. The learned Judge held against the Defendants. He said:—

I have already held in a case against the same Defendants that an action in which the pleadings were closed before the war is not automatically suspended by the outbreak of war. In that case I was told by the Defendants and it was not disputed that the Defendants acquired the status of alien enemies on the outbreak of the war. In this case that proposition is challenged. On the facts I think that, apart from the effect of the Proclamation of October 8th, the Defendants were not in the position of alien enemies. In the case of individuals and at common law the question whether a man is to be treated as an alien enemy for the purpose of his contracts, right of suit and the like, does not depend upon his nationality or even upon his true domicile, but upon whether he carries on business in this country or not. If he does, it is not illegal, even during war, to have business dealings with him in this country in respect of the business which he carries on here. He is not in respect of that business divided by the war line, but has what is sometimes called a commercial domicile here. The same thing is true of companies which have a head office in Germany, but which have a branch office here in respect of business transactions with such branch office.

The matter is discussed by Lord Lindley in **Janson v. Driefontein Consolidated Mines (Limited)**, ([1902] A. C., at pp. 505, 506), and in the cases cited by him. In my judgment the Defendant company did upon the facts so far carry on business through their under-writers here as to prevent the rules applicable to alien enemies from

applying to business transacted with those underwriters as this business in fact was.

Turning now to the Proclamations affecting the question this position seems to be recognized by the Executive Government in Clause 6 of the Proclamation of September 9. If this were the present position it would, I think, be reasonably clear that the Plaintiff's right to sue is unfettered by the war and that no question of alien enemy arises. The Defendants' status has, however, undoubtedly been altered by Clause 5 of the Proclamation of October 8. The Defendants are since that date in the same position as alien enemies in respect of their business transacted here, but I agree with the Plaintiff that that Proclamation is not retrospective. Even if this Proclamation is to be treated as affecting the position I am not prepared to hold that payment of a loss by a German insurance company or an action against such insurance company to recover a loss is a transaction within the meaning of the Proclamation. So to hold would be to deprive a British subject of the right to receive money from, or to sue, an alien enemy, which, in my opinion, he at law has, at any rate, when the right to be paid or to sue has accrued before the Defendant has acquired the status of an alien enemy, and I should require to find clear words in a Proclamation to induce me to decide that the Executive Government has given the alien enemy relief to which he is not otherwise entitled.

Paragraph 7 of the Proclamation of September 9 which has not been repealed seems to me in accordance with this view. I think that this clause is conclusive that the right to receive payment from an alien enemy is intended to be left as it stands at common law. It is, perhaps, not immaterial to observe that the word "transactions" is used in this clause as in Clause 5 of the Proclamation of October 8. In this clause the word clearly refers to the business dealings in respect of which the right to payment arises and does not include, but is used in contradistinction, to the payments themselves. I see no reason to suppose that the same word has not the same meaning in both Proclamations.

Mr. Wright for the Plaintiff.

Mr. Mathew for the Defendants.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

Civil Appellate Jurisdiction. Before Holmwood and Carnduff, JJ. Appeals from Appellate Decrees Nos. 2911 of 1911 and 55 of 1912. THAKUR JUGDISHWAR DOYAL SINGH, Plaintiff, Appellant v. RAGHU SINGH AND OTHERS, Defendants, Respondents. 26th November, 1914.

Chota Nagpur Tenancy Act, sec. 177—Provision, mandatory—Rent, payment of, to third person—Third person should be made party.

The principal question which arose in the appeal was whether sec. 177 of the Chota Nagpur Tenancy Act applied to the case, and if not, whether its provisions had been sufficiently complied with. The suit was one for rent against certain *thiccadars* who stated that they had in good faith paid their rent to one Rameswar, the son of a female life-tenant, under a compromise entered into by her with the Plaintiff. Rameswar in his evidence set up his claim to receive the rent and received it.

Held, that the setting up by the tenant of Rameswar as his landlord was not a right claimed by or on behalf of the third person within the meaning of sec. 177 of the Chota Nagpur Tenancy Act. The Court should have made him a party to the suit and decided the question of the actual payment of rent to him in good faith.

That the provision in the said sec. 177 that the third person should be made a party to the suit was mandatory.

Babus Umakali Mukherjee and Kulwant Sahay for the Appellant.

Babus Mohendra Nath Roy and Jamini Mohan Mukerjee for the Respondents.

Case remanded.

A. T. M.

Civil Appellate Jurisdiction. Before Coxe and Richardson, JJ. Appeal from Appellate Decree No. 2779 of 1910. BABU BHATTU LAL, Plaintiff, Appellant v. MUSSAMMAT RAM RUP KOER and others, Defendants, Respondents. Heard 18th November, Judgment 26th November, 1914.

Mortgage, invalidity of—Mortgagee, subsequent, if can question the validity.

The appeal arose out of a suit on a mortgage which was contested only by Defendant No. 4, the Appellant. The appeal related only to a sum of Rs. 1,087 odd which the Defendant No. 4 drew as compensation awarded under the Land Acquisition Act in respect of a part of the mortgaged property. The Plaintiff claimed under a mortgage executed in his favour by Sheo Nandan Prosad Singh and his case was that Sheo Nandan was the manager of a joint family and borrowed the money for legal necessity. The lower Appellate Court held that Sheo Nandan was joint with his brother or cousin Raghu Nandan, but that no necessity had been proved, and accordingly the mortgage was invalid. Defendant No. 4 held a mortgage which was executed in his favour by both Sheo Nandan and Raghu Nandan and included the property compulsorily acquired. That mortgage was subsequent in date to the Plaintiff's mortgage, but the Defendant No. 4 was permitted to withdraw the compensation money in part-satisfaction of his mortgage debt.

Held, that Defendant No. 4 was entitled to set up the invalidity of the Plaintiff's mortgage.

Balgobind v. Narain (L. R. 20 I. A. 116, I. L. R. 15 All. 339), and **Mahammad v. Mithu** (I. L. R. 23 All. 783), followed.

Jamuna v. Ganga (I. L. R. 19 Cal. 401), distinguished.

Babus Joges Chunder Roy and Hari Bhusan Mukerjee for the Appellant.

Babus Umakali Mukerjee, Surendra Nath Guha and Biraj Mohan Mojumdar for the Respondents.

Appeal dismissed.

A. T. M.

THE EAST INDIAN RAILWAY CO. *v.* NILKANTA ROY.

consignee, but the contents were missing. It seems to me that that decision of the Bombay High Court is good law. It is impossible to say that there was loss of complete packages when such material portions of the packages as the tins were delivered to the consignee. On both these grounds, the present Rule must be made absolute with costs, one gold mohur.

N. R. CHATTERJEA, J.—I agree.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD DUNEDIN.
LORD MOULTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
Heard, 20 and 21, April.
Judgment, 18, June.

RAVI VEERARAGHAVULU and others, Appellants.
v.
SRI RAJA BOMMA DEVARA VENKATA NARASIMHA NAIDU BAHADUR, ZAMINDAR GARU, Respondent.

Civil Procedure Code (Act XIV of 1882), s. 584—Second appeal—Construction of document, if question of law when document not the only evidence of contract—Second appeal if lies from Collector's decision under Act VIII (Mad.) of 1865, secs. 9, 69—Practice, long-standing, allowing appeals—Appeal if may be taken away by implication of statutory enactment.

Where by an arrangement come to between the zamindar and the raiyats, money-payment was substituted in 1876 for payment of a share of the produce which prevailed before that year, subject to the condition that when the lands (then yielding only "dry crops") were fit for "wet" cultivation, "wet rates" (which were higher) would be settled, and the zamindar offered pattas in which he claimed in respect of lands recently subjected to "wet" cultivation an enhanced rate of rent based on the produce-sharing system, and the tenants in defence urged that the cash system was intended to be introduced permanently and that it was on the basis of the cash system that a subsequent revision of rates had been made, and the first Court and the Court of first appeal came to the conclusion that the arrangement by which produce-sharing was converted into cash-payment was a permanent one, the High Court on second appeal held that it must be gathered from the construction of the tenants' muchilikas executed prior to the year when "wet" cultivation was begun that the parties contemplated a return to the produce-sharing system if "wet" or garden crop were raised on dry land:

Held (*by the Judicial Committee*).—*That the muchilikas were only a part of the evidence on which the lower Courts acted and the High Court in second appeal in reversing the finding of fact of the lower Appellate Court assumed a jurisdiction it did not possess.*

MUSSUMAT DURGA CHOWDHRAIN *v.* JAWAHIR SINGH CHAUDHRI (3) *followed.*

In a suit under sec. 9 of Act VIII (Mad.) of 1865 by the zamindar to enforce a patta, a second appeal lies from the decision of the District Judge passed on appeal from the order of the Collector.

The Judicial Committee would not be disposed to interfere with the long-standing practice of permitting such second appeals, even if they thought there was an implied rule (under sec. 69) against second appeals from the decisions of the District Judge with respect to adjudications under the Act by the Collector.

VEERASWAMY *v.* MANAGER, PITTAPUR ESTATE (2), *approved.*

This was an appeal from a judgment of the Madras High Court (Munro and Pinhey, JJ.), dated the 13th October 1908.

(2) I. L. R, 26 Mad. 518 (1902).
(3) L. R. 17 I. A. 122 (1890).

The facts of the case sufficiently appear from their Lordships' judgment.

Mr. L. DeGruyther, K. C., and *Mr. Parikh* for the Appellants submitted that no appeal lay to the High Court under sec. 69 of the Madras Act, 8 of 1865. Under sec. 50 of that Act, suits before the Collector were summary suits; *see* secs. 65, 72. There was no appeal from the Collector's judgment except that provided by sec. 69 which gave an appeal to the Zillah Judge only. The Act did not give a further right of appeal to the High Court and in the absence of a statutory provision giving the right of appeal, there was no appeal: *Meenakshi Naidoo* v. *Subramaniya Sastri* (4), and *Rangoon Botatoung Co., Ld.* v. *The Collector, Rangoon* (5). The point was not raised in *Appa Row* v. *Narasayya* (1). Again, the High Court had no jurisdiction in a second appeal under sec. 584 of the Code of Civil Procedure, 1882, to set aside a finding of fact of the lower Courts, both of which had concurrently found that the contract or arrangement was permanent *Mussumat Durga Chowdhrain* v. *Jawahir Singh Chaudhri* (3).

Sir Erle Richards, K. C., and *Mr. Kenworthy Brown* for the Respondents submitted that the High Court had entertained appeals from the judgment of the Zillah Judge ever since 1865. The point was expressly decided against the Appellants' contention in *Ganne Kotappa* v. *Venkataraniya* (6) and *Veeraswamy* v. *Manager, Pittapur Estate* (2). Sec. 69 provides "a regular appeal" to the Zillah Judge and a special appeal always lay to the Sadar Court from all decisions passed in a regular appeal by the subordinate Courts. As to the second point there was really no finding of fact. It was not a pure question of fact, and the High Court was competent to form its own conclusion: *Lala Fateh Chand* v. *Rani Kishen Kunwar* (7), *Ramu Aiyar* v. *Sankara Aiyar* (8). In any case the suit ought to be remitted to the Collector's Court for deciding the necessary questions in issue between the parties.

(1) L. R. 37 I. A. 110; s. c. 14 C. W. N. 938 (1910).
(2) I. L. R. 26 Mad. 518 (1902).
(3) L. R 17 I. A. 122 (1890).
(4) L. R. 14 I A. 160, 165 (1887).
(5) L. R. 39 I. A. 197: s. c. 16 C. W. N. 901 (1912).
(6) 10 Mad. L. J. 398 (1900).

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—These consolidated appeals from certain decrees of the High Court of Madras arise out of a number of suits brought by the Plaintiff-Respondent in the Court of the Head Assistant Collector of the Bezwada Division, under the provisions of sec. 9 of the Madras Rent Recovery Act (Act VIII of 1865). The object of all the actions was to enforce by legal process the acceptance by the Defendants of the pattas or leases he had tendered to them.

The scope of the material sections of Madras Act, VIII of 1865, was considered by their Lordships in *Appa Row* v. *Narasayya* (1); it is sufficient, therefore, to say in this case that under this Act the landlords are required to enter into written engagements with their tenants, in default of which no suit is maintainable to enforce the terms of the tenancy, and that in case of the refusal by the tenant to accept a patta "such as the landlord is entitled to impose," the landlord can proceed under sec. 9 to enforce the acceptance by a summary suit before the Collector.

It has to be remarked that in the Madras Presidency, or certain parts thereof, ir-

(1) L. R. 37 I. A. 110; s c. 14 C. W. N. 938 (1910).
(7) L. R. 39 I. A. 247 at p. 258 (1912).
(8) I. L. R. 31 Mad. 89, 98 (1907).

rigated lands on which are grown what are called "wet crops," are generally subject to a higher rate of rent, either in kind or in cash, than those which yield only "dry crops," and that it is usual for the zamindars to enter into yearly engagements by tendering pattas from year to year and obtaining muchilikas or counterparts executed by the tenants evidencing the acceptance of the terms of the lease.

Shortly stated, the Respondent's case, as made in his plaint, is that the raiyats, the Defendants in the suits, prior to Fasli 1283 (approximately corresponding to 1876), paid rent for the lands in their occupation on the Asara or produce-sharing system, that in that year an arrangement was come to between them and the zamindar by which a money-payment "was substituted for the share of the produce," that this arrangement, however, was subject to the condition that whenever "the lands were fit for wet cultivation the wet rates would be settled." And he went on to add in paragraph 3 of the plaint :—

"The lands mentioned in the tendered patta hereunto annexed having been newly brought under wet cultivation, and on the Plaintiff's officials demanding Defendant to accept the agreement as in the surrounding villages in respect of wet crop cist, he (the Defendant) having refused to do so, the Asara patta with the rates prevailing under the immemorial system of sharing the grain head (Palambaram system) was tendered for the wet land cultivated by him (Defendant) for this year. As the Defendant, taking advantage of this, refused to come to any agreement in respect of the dry land also for which there was no dispute at all, the rates and babats in respect not only of the said wet land, but also of the remaining dry land, were as usual entered in the said patta. All the terms of the tendered patta so far as they are connected with the Asara system are applicable to the Asara system, and the remaining ones to the Veesabadi system."

The raiyats in their defence alleged that the arrangement introducing the Veesabadi or cash system into their villages was intended to be and was in fact permanent in character; that some years later (Fasli 1292) when the money rates were revised, the Veesabadi system was accepted as the basis of the new settlement; that recently they had been able, without any assistance or contribution from the Plaintiff, to make their lands irrigable and fit for wet cultivation, and that the Plaintiff was not entitled to revert to the sharing system and thus indirectly to enhance their rents without the interposition of the Collector's Court.

On these allegations of fact the parties went to trial. The issues framed by the Head Assistant Collector are not very clearly worded, but they sufficiently indicate the main points for determination, *viz.*, whether the substitution of the Veesabadi for the Asara system in the Defendant's villages was permanent in its character or, in other words, was the Plaintiff zamindar entitled to revert to the sharing system on the lands being made irrigable by the tenants.

The Collector on the evidence held in substance that the conversion of the Asara rates into cash payment in 1283, which was confirmed in 1292, and had been acted upon ever since, was a permanent arrangement, and that the Plaintiff was not entitled to impose on the tenants pattas on the Asara basis. He accordingly dismissed the Plaintiff's suits without entering into the questions raised in the latter part of para. 3 of his plaint.

On appeal by the zamindar the District Judge affirmed the decrees of the Collector in respect of the finding of fact relative to the character of the arrangement of 1283, and upheld the orders dismissing the suits.

From the decrees of the District Judge

the Plaintiff preferred second appeals to the High Court of Madras. It is necessary to set out that portion of the High Court judgment which forms, in their Lordships' opinion, the key to the decision of the learned Judges. They say:

"Till Falsi 1283 the Asara system was in force. In Fasli 1284 money rents were introduced and the rates of such rents were permanently fixed in Falsi 1292. At that time all the lands were dry. Wet cultivation began in Fasli 1314, and the pattas now in dispute were then tendered, as the tenants refused to pay more than the rates fixed in 1292 which they had previously been paying for the lands as dry. Nothing had been done by the Plaintiff to provide facilities for irrigation. In the muchilikas executed by the tenants for Faslis prior to 1314 there are clauses to the effect that the Plaintiff may make an extra charge if wet or garden crops are raised on dry lands. The amount of such extra charge is not however stated. If the Plaintiff is entitled to demand Asara rates, the rates mentioned in the pattas tendered are correct. The Courts below have taken the view that the Plaintiff has tendered Asara pattas as a means of enhancing the rent and that as he has not done anything to justify an enhancement of the rent, and has not obtained the sanction of the Collector for the enhancement, he is only entitled to the rents fixed in Fasli 1292.

"For the Plaintiff it is contended that inasmuch as there is no contract as to the rates of rent payable on lands cultivated with wet crops, he is entitled under clause 3 of section 11 of Act VIII of 1865 to claim Varam rates, it being admitted that no money assessment has been fixed under clause 2 of that section.

"That there is no contract as to the rates of rent payable for wet cultivation is clear from the admitted muchilikas, the material clauses of which have already been referred to. The only rates fixed were for dry cultivation The rates to be charged for wet cultivation were left undetermined. This being so, the contention for the Plaintiff seems to be well-founded."

They accordingly set aside the orders of the District Judge, and holding that "the pattas tendered by the Plaintiff were proper pattas and that the Defendants must accept them," they decreed the second appeals with costs in all the courts.

On an application for review of judgment, the learned Judges appear, however, to have thought that "the contract between the parties is contained in the admitted muchilikas and must be gathered from the construction of those muchilikas." They therefore rejected the application for review.

The raiyat Defendants have appealed to His Majesty in Council, and two points have been urged on their behalf against the validity of the judgment of the High Court.

It is contended in the first place that no appeal lay to the High Court under sec. 69 of the Act which provides for one appeal only from the order of the Collector to the Zillah Judge. This contention, however, ignores the provisions of sec. 372 of Act VIII of 1859, which, at the time the Madras Rent Recovery Act of 1865 was enacted, was the law regulating the procedure of the Civil Courts in India outside the Presidency towns. Under that section a special appeal lay to the Sadar Court from all decisions passed in regular appeal by the Courts subordinate to the Sadar Court. It is not disputed that the Zillah Judge's Court was subordinate to the Sadar Court, nor that the appeal to the Zillah Judge from the Collector's Court was a "regular appeal"—an appeal on law and facts. Later legislation substituted the High Court for the Sadar Court, and the District Judge for the Zillah Judge, but the subordination of the one to the other was maintained. The provisions of Act XIV of 1882, the law in force at the time when these suits were instituted, are clear on the point that an appeal lies from the order of the District Judge to the

High Court, unless that right is taken away by express legislation or by some express provision of law.

The point that a second appeal lies to the High Court in cases arising under Act VIII of 1865, has been expressly decided in *Veeraswamy* v. *Manager, Pittapur Estate* (2), and the practice appears to have been ever since the passing of the Act for such appeals to be preferred to the High Court. Their Lordships would not be disposed to interfere with such a long-standing practice, even if they thought there was an implied rule against second appeals lying from the decisions of the District Judge with respect to adjudications under the Act by the Collector. Their Lordships must, therefore, overrule the first objection.

In the second place, it is contended for the Appellants that the High Court was not competent under sec. 584 of the Civil Procedure Code (Act XIV of 1882) to set aside a finding of fact which had been concurrently arrived at by the two inferior Courts.

Sections 584 and 585 of the Civil Procedure Code are in these terms :—

"584. Unless when otherwise provided by this Code or by any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds, namely:—

"(*a*) The decision being contrary to some specified law or usage having the force of law;

"(*b*) The decision having failed to determine some material issue of law or usage having the force of law;

"(*c*) A substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits.

"585. No second appeal shall lie except on the grounds mentioned in sec. 584."

This distinctly prohibits second appeals on questions of fact and confines the competency of the High Court to deal with questions of law and procedure.

In the present case the sole question for determination was whether the arrangement entered into in 1283, and confirmed in 1292, was permanent. The Plaintiff's allegation was that he was entitled under the circumstances to revert to the system that existed prior to 1283. The Collector and the first Appellate Court who alone were competent to deal with the facts, came to the conclusion that the arrangement was permanent. The muchilikas were only a part of the evidence on which they acted. It seems to their Lordships that the learned Judges, acting in inadvertence of sec. 584 of the Code, assumed a jurisdiction which they did not possess. The rule relative to second appeals which was laid down by this Board in *Mussumat Durga Chowdhrain* v. *Jawahir Singh Chaudhri* (3), is clearly applicable to the present cases.

On the whole their Lordships are of opinion that the judgments and decrees of the High Court cannot stand. Sir Erle Richards has, however, submitted that the simple dismissal of the suits would seriously prejudice the rights of the zamindar with regard to the matters referred to in paragraph 3 of the plaint which were not dealt with by the Collector.

Their Lordships are of opinion that the best course under the circumstances would be to set aside the judgment and decrees of the High Court with a declaration that the Plaintiff is not entitled to enforce the acceptance by the tenants of the pattas tendered by him, and that the cases should be sent back to be remitted to the Collector's Court for the drawing up of proper decrees and dealing with any other questions that may be outstanding in these

(2) I. L. R. 26 Mad. 518 (1902).

(3) L. R. 17 I. A. 122 (1890).

actions between the parties. And their Lordships will humbly advise his Majesty accordingly.

The Plaintiff-Respondent will pay the costs of this appeal and of the proceedings in the Courts of India.

Solicitor: *Mr. Edward Dalgado*, for the Appellants.

Solicitor: *Mr. Douglas Grant* for the Respondent.

B. D. *Appeal allowed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES
NOS. 120 AND 183 OF 1911
AND
NOS. 51 AND 121 OF 1910.

CHITTY, J.
TEUNON, J.
1913,
Heard, 19, 20, 23 to 25, June.
Judgment. 8. July.

BISWANATH GORAIN & ors., Plaintiffs, Appellants,
v.
SURENDRO MOHON GHOSE & ors., Defendants, Respondents.

Impartible estate—Khorposh grant—Sub-soil right—Chota Nagpur Encumbered Estates Act (B. C, VI of 1876), sec. 3—Plaintiff claiming alternative reliefs obtaining a decree—Right of appeal—Civil Procedure Code, secs. 96, 97, Or. XLI, r. 33—Lease—Failure of consideration—Refund of consideration money—Limitation Act (IX of 1908), Sch. I, Arts 62, 97, 114, 115 and 116.

The interest of a khorposhdar heritable in the male line was a limited interest liable to be defeated at any time by the failure of heirs and thereupon resumable by the proprietor for the time being, and would not be an interest sufficient to carry with it the sub-soil rights.

A Plaintiff who claims for alternative reliefs in his plaint can prefer an appeal although he obtained a decree. Or. XLI, r. 33, confers on the Appellate Court the power to pass such decree as ought to have been passed.

A deed of release executed by a proprietor at a time when his estate was managed under the Chota Nagpur Encumbered Estates Act, VI (B. C.) of 1876, cannot be operative, as the proprietor was wholly incompetent to make any such disposition of his property. It was not a case of a merely voidable agreement.

An admission to that effect in a chhar sanad *(which did not operate as an alienation) granted by the disqualified proprietor did not bind the estate even as an admission.*

When there is total failure of consideration with regard to a lease, a claim to a refund of the consideration money is governed by Art. 63 of the First Schedule of the Limitation Act.

Money paid under compulsion of legal proceedings cannot be recovered.

MARRIOT *v.* HAMPTON (1), *followed.*

This was an appeal preferred on the 11th of April 1911, against the decree of Babu Adwaita Prosad De, Subordinate Judge of Zilla Manbhum, dated the 15th of December 1910.

The facts of the case were shortly these:—

The Plaintiffs and Defendants Nos. 36 and 37 were members of a joint family, and while joint they took two *dar-mokurari* leases, dated 14th January 1901 and 19th May 1901, from Defendants Nos. 2 and 1, respectively, in the name of Nandalal Gorain, of the under-ground rights of one-half of the lands in Mauza Barora. The Defendants Nos. 1 and 2 were the *mokuraridars* of the under-ground rights under one Nagar Singh and his co-sharers by virtue of *mokurari* pattas, dated 23rd March 1895. Nagar Singh and others, the lessors, were the khorposhdars of the village heritable in the male line and liable to resumption to the parent estate on the extinction of male heirs. Rajkumar Giri-

(1) 7 T. R. 269 (1797)

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dhari Singh Thakur represented the eldest branch of the family, and he was the owner of the parent estate. His estate was, however, under the management of the Encumbered Estates Act authorities from 1876 to August 1901.

Defendant No. 1 Surendra Mohon Ghosh obtained a deed of release chiefly with respect to the under-ground rights of the mauza executed by Rajkumar Thakur Giridhari Singh on the 29th December 1895 and a similar deed was also obtained on the 30th December 1895 by Nagar Singh and others, the lessors of Defendants Nos. 1 and 2. By these deeds Thakur Giridhari Singh admitted that Nagar Singh and others had ancestral *lakheraj mahatran* right in 8 annas share of the village and were entitled to the sub-soil.

After the release of the estate by the Encumbered Estates Act authorities, Giridhari Singh executed a *mokurari* patta in favour of Ran Bahadur Singh on 15th April 1902 together with all under-ground rights. Defendant No. 37 Gopinath Gorai then took a lease of the sub-soil rights of 925 bighas of land in Mauza Barora from Ran Bahadur Singh on the 28th January 1907 and claimed to be in possession of the lease-hold properties by virtue of this deed.

Plaintiffs instituted this suit on the 13th August 1909 making all the persons interested in any way in the mauza (Barora) parties and claimed for the following reliefs :—

(1) That they might be given khas possession of the lands covered by their *darmokurari* patta, dated 14th January 1901 and 19th May 1901; jointly with Defendants Nos. 35 and 36.

(2) Plaintiffs also claimed an alternative relief and stated that if the Court found that Defendants Nos. 1 and 2 had not the title which they purported to give to the Plaintiffs by the aforesaid leases, then they might be given a decree for the sums which had been realised from them by Defendants Nos. 1 and 2 in the shape of rent and *selami* and that a declaration might be made in favour of the Plaintiffs that they were not liable to pay any rent to Defendants Nos. 1 and 2 under the terms of the aforesaid leases.

(3) The Plaintiffs also prayed for an injunction on the Defendants Nos. 1 and 2 restraining them from executing rent-decrees obtained by them and from bringing further suits pending the disposal of the suit against Plaintiffs and Defendant No. 35.

The Defendants Nos. 1 and 2 contended that the suits were not maintainable being in the nature of interpleader suits. That the Plaintiffs and Defendants Nos. 35 and 36 were in possession of the coal lands under leases granted by them That the points now raised by the Plaintiffs were already determined in the previous rent suits and hence the questions were *res judicata*. That the rights as between the Defendants *inter se* could not be determined in this suit. That Giridhari was estopped from denying the rights of Defendants Nos. 1 and 2 by reason of the deeds of release granted by him. That under the leases granted by Defendants Nos. 1 and 2 in favour of Plaintiffs and Defendant No. 35, there was no contract to demarcate the lands by metes and bounds, and hence the suit could not succeed on any of the grounds mentioned in the plaint. The Defendant No. 5 Giridhari Singh stated that the lessors of Defendants Nos. 1 and 2 had no sub-soil rights and that during the period his estate was under the protection of Encumbered Estates Act, he was not competent to grant any *chhar sanad*, etc., and that Plaintiffs' claim was liable to be dismissed. The heirs of De-

fendant No. 37, Gopinath Gorain, also supported the defence of Giridhari Singh.

The Subordinate Judge gave the Plaintiffs a decree for khas possession after partition with the various lessees of Mauza Barora as also with Defendants Nos. 36 and 37 which was not claimed by them in the plaint. He held that the Defendant No. 5 was estopped from denying the rights of Defendants Nos. 1 and 2. He held, however, that the lessor of Defendants Nos. 1 and 2 had not the under-ground rights of Mauza Barora, being khorposhdars, their interest being heritable in the male line and liable to resumption on the extinction of the male line.

The Plaintiffs appealed on the ground that the decision of the Subordinate Judge was wrong on a point of law and they claimed their alternative relief in this appeal.

The Defendants Nos. 36 and 37 filed cross-objections on the ground that the Plaintiffs could not obtain khas possession and their prayer for khas possession either separately or jointly with Defendants Nos. 36 and 37 ought to have been rejected.

In Nos. 120 and 183

Mr. B. Chackrabartty and *Babus Gopal Chandra Sarkar, Sarat Chandra Dutt* and *Rishindra Nath Sarkar* for the Appellant.

Dr. Rash Behari Ghose, Babus Umakali Mookerjee, Dwarkanath Chakrabartty, Mohendra Nath Roy, Bipin Behari Ghosh, Biraj Mohon Mojumdar, Bankim Chandra Mookerjee, Ramani Mohan Chatterjee, Lalit Mohon Ghosh, Suresh Chundra Das, Karunamoy Ghosh, Sirish Chandra Dey and *Sarat Chandra Bose* for the Respondents.

In No. 51

...*bu Surendra Nath Ghoshal* for the ...t.

...*Dwarkanath Chackrabartty, Bipin* ...*hose, Bankim Chandra Mookerjee, Ramani Mohon Chatterjee* and *Ramesh Chandra Sen* for the Respondent.

In No. 121

Babu Surendra Nath Ghosal for the Appellant.

Babus Ramani Mohon Chatterjee and *Ramesh Chundra Sen* for the Respondent.

Babu Mohendra Nath Roy for Defendant No. 1.—I want to support the decree on the following grounds:—

(1) The Appellants have got a decree for khas possession and partition which they claimed in their plaint. Therefore, they have no right of appeal.

[CHITTY, J.—He wants to challenge the decree on the ground that the Judge has made a mistake of law in awarding him possession and that he now wants to fall back on his alternative relief.]

Refers to an endorsement on the plaint by Plaintiffs' pleader, where it is stated that "Plaintiffs claim title under Defendants Nos. 1 and 2 and do not deny their title; but the Plaintiffs do not admit the area to which the said Defendants are entitled." After this can they fall back upon their alternative prayer in the plaint?

[CHITTY, J.—Can that bind the Plaintiffs? It is an admission by the pleader on a point of law.]

All that they claim is that if the Court finds that their lessors have title, they should get possession and if not, then they claim refund. Having got what they obtained they cannot appeal.

[CHITTY, J.—Defendants Nos. 36 and 37 have filed cross-objection; we can decide the question on their cross-objection even if there be no appeal by the Plaintiffs.]

If the appeal fails, I submit they are not entitled to raise a cross-objection as against a Respondent.

[CHITTY, J.—It is open to them to say that Plaintiffs have no title; they can raise a cross-objection. Moreover, the judgment

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is wrong on a point of law, and the Plaintiffs now claim the alternative relief.]

They cannot claim a new thing on appeal; their claim in the first Court was not an alternative but a contingent one.

[CHITTY, J.—Sec. 96, C. P. C., gives a right of appeal against all decrees.]

My submission is that a party aggrieved by the judgment of the lower Court can alone appeal.

[CHITTY, J.—No. Sec. 97 refers to aggrieved party, but sec. 96 does not.]

On the merits he submitted that the findings of the Subordinate Judge against Plaintiffs' case were that the estate within which the disputed lands were situated formed part of an impartible estate and was the khorposh property of one Nagar Singh and others, heritable in the male line, with a right of reversion of the proprietor of the impartible estate. He then holds that there are certain circumstances by reason of which the proprietor of the impartible estate is estopped from denying the right of the khorposhdars to grant a mining lease. Although, at the time the Defendant No. 5 executed the deed of release his estate was under the protection of the Encumbered Estates Act and he was a disqualified proprietor under sec. 3, cls. (*a*) and (*c*) of the Encumbered Estates Act, still if he goes on without repudiating the transaction after the disability has ceased, he would be estopped from saying anything to the contrary afterwards.

[CHITTY, J.—Notice is issued that the estate is under the management of Encumbered Estates Act and people who deal with proprietors of such estates deal at their risk.]

Refers to deeds of release executed by the proprietor and says it does not come under sec. 3 of the Encumbered Estates Act. Refers to certain letters alleged to have been written by Defendant No. 5 to Defendant No. 1 stating that he had never obstructed the Gorains, the lessees of Defendant No. 1, from taking possession of the sub-soil of the mauza. He also alluded to the deed of release in one of these letters. These letters were written after the release of the estate from the Encumbered Estates Act authorities. Refers to certain other documents which were attested by Defendant No. 5 and which purported to grant sub-soil rights, some of which were after the release of the estate from the Encumbered Estates Act authorities. Even assuming that the deed of release amounted to an alienation and came within the provision of sec. 3 of the Encumbered Estates Act, still by reason of his subsequent conduct it is clear that he ratified what he did before.

[CHITTY, J.—You cannot ratify a void contract.]

It would be perfectly competent to him to affirm a contract after the disability has ceased. Refers to *Gregson* v. *Udoyaditya Deb* (2), and *Roy* v. *Thakur Ram Jiwan Singh* (3). Refers to sec. 115 of the Evidence Act and relies upon the deed of release, letters and attestation of documents by Defendant No. 5 as his acts and declarations by which he is estopped from denying the rights of Defendants Nos. 1 and 2.

[CHITTY, J.—How did the Plaintiff act under those letters and deeds?]

On the strength of the *chhar* they took the lease.

[CHITTY, J.—But the *chhar* was executed when the Defendant No. 5 was a disqualified proprietor under the Encumbered Estates Act.]

[TEUNON, J.—What was done on the strength of these letters after 1902?]

(2) I. L. R. 17 Cal. 223 at p 227 (P. C.) (1889).
(3) I. L. R. 33 Cal. 363 (1905).

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They continued to realise rent from the lessees.

[CHITTY, J.—If a man's incapacity is well known, can you stop him by reason of a declaration made with the knowledge that he was incompetent to bind himself by the same?]

There is nothing in the Encumbered Estates Act which prevents a proprietor whose estate is encumbered from making a declaration under circumstances which might estop him afterwards. The Subordinate Judge is also wrong in holding that the khorposhdars had no sub-soil rights. Here the proprietor has only a remote chance of reversion.

Refers to *Prince Mahomed Bukhtyar Shah* v. *Rani Dhojamani* (4), *Jyoti Prosad* v. *Lachipore Coal Co.* (5), *Durga Prasad* v. *Praja Nath* (6), Laws of England, Halsbury, Vol. XX, pp. 508-509, *Lewis* v. *Branthwaite* (7). It is virtually a case of partition made in favour of a junior branch of the family to be resumed to the parent estate under certain contingencies. If they have not the sub-soil rights, who are the persons to grant them?

[CHITTY, J.—The grantor and grantee might join to give such a lease.]

The findings of the Subordinate Judge that the estate was impartible and that Defendant No. 5 and his co-sharers had not the ancestral rent-free *mahatran* right as alleged by them is wrong. Referred to the evidence on the point and contended that if the estate was not impartible, Defendant No. 3 could grant the mineral rights. On the question of the refund of the *selami* and rent if there was an entire failure of consideration, *i.e.*, if the lessees did not obtain possession, there was a warranty and there was a breach, I may be liable to damages; under-ground lease implies also grant of surface rights. I am surely entitled to the surface and also to work opened mines though not to open a new mine. According to the finding the lessees were in possession from Aghran 1314.

If there were absolutely no consideration from the beginning, the claim for refund of the *selami* is barred by limitation. Refers to *Hanuman* v. *Hanuman* (8).

[CHITTY, J.—Your rent-decrees were passed on the ground that they were in possession and you cannot say that at that time there was failure of consideration.]

If I had no title that is failure of consideration. Refers to *Hanuman* v. *Hanuman* (9), *Ardesir* v. *Vaje Sing* (10), *Ramkumar* v. *Ram Gour* (11). If the case is on the covenant for quiet enjoyment, Art. 116 might apply. Refers to *The Zamindar of Vizianagram* v. *Behara Suryanarayana* (12). As to moneys realised under decrees they cannot get a refund unless the decrees are superseded.

Marriot v. *Hampton* (1), *Shama Purshad* v. *Hurro Purshad* (13), *Juggobundhoo* v. *Mumtaz Hossein* (14), *Jogesh Chunder* v. *Kali Churn* (15), *Dwarka* v. *Mahendra* (16).

[CHITTY, J.—This is a suit to recover the money on the ground that the decree was passed without jurisdiction.]

[TEUNON, J.—Cannot a suit be brought for refund as well as for setting aside the decree?]

(4) 2 C. L. J. 20 (1905).
(5) I. L. R. 38 Cal. 845 (1911).
(6) I. L. R. 39 Cal. 696 (P. C.) (1912).
(7) 36 Rev. Rep. 613 : s. c. 2 Barn and Adol 437 (1831).

(1) 7 T R. 269 (1797).
(8) I. L. R. 19 Cal. 123 (P. C.) (1891).
(9) I. L. R. 15 Cal. 51 (1887).
(10) I. L. R. 25 Bom 593 at p. 597-8 (1901).
(11) I. L. R. 37 Cal. 67 at p. 70 (1909).
(12) I. L. R. 25 Mad. 587 at p. 596 (1901).
(13) 10 M. I. A. 203 at p. 210 (1865).
(14) W. R. (Gap. No.) 205 (1864).
(15) I. L. R. 3 Cal. 30 (1877).
(16) 16 C. L. J. 437 at p. 439 (1912).

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A decree can be set aside under sec. 44 of the Evidence Act.

Babu Golap Chandra Shastri for the Appellant.—I pray for rescission of contract and submit that Art. 114 of the Limitation Act would apply. The contract was entered into by mistake and time begins to run when the right to rescind the contract became known to Plaintiff. We say that we came to know of it some time in 1908. As to moneys realised under rent-decrees, submits that the decision in the present case will virtually supersede the decrees.

Dr. Rash Behari Ghosh on behalf of Defendants Nos. 36 and 37 supported the Plaintiffs' appeal and contended that the suits so far as the claim for possession was concerned ought to be dismissed.

The JUDGMENT OF THE COURT was as follows :—

Nos. 120 and 183.

The two suits out of which these two appeals arise (suits Nos. 331 and 332 of 1909) relate to 650 bighas of coal lands in Mauza Barora appertaining to Pargana Nawagarh, Kismat No. 2, the zamindari Nawagarh, Kismat No. 3, belonging to Giridhari Singh Thakur, Defendant No. 5, he having succeeded to that estate as the eldest son of Joy Nandan Singh Thakur. It appears that many years ago, Pargana Nawagarh was divided into four kismats, each of which formed a separate estate, and each of which appears to have descended, according to the rule of primogeniture, on the eldest sons. The accompanying genealogical table will show the relationships in the family of the zamindars. The family is governed by the Mitakshara School of Hindu Law. Eight annas of Mauza Barora was vested in Chhatradhari Singh, Nagar Singh, Dukhit Singh and Amrita Kumari as khorposhdars. What their precise interests in the land were, we will discuss later. By a *maurasi mokurari* patta, dated 23rd March 1895, these four persons settled the sub-soil rights in 500 bighas of land comprised in the 8 annas share of Mauza Barora with Surendra Mohan Ghose, Defendant No. 1 ; and, by a similar patta of even date, they settled another 150 bighas comprised in the same 8 annas share of the mauza with Defendant No. 2, Jogmaya Debi, wife of Nilmadhab Bajpai. By a lease, dated 19th May 1901, the Defendant No. 1 made a *dar-mokurari* settlement of the sub-soil rights in the 500 bighas with Defendant No. 36, Dinanath Gorain ; and, by a similar lease dated 14th January 1901, the Defendant No. 2 made a *dar-mokurari* settlement of the sub-soil rights in the 150 bighas with the same person. In the *maurasi-mokurari* pattas, the property is described as "our long possessed 8 annas share in Mauza Barora." The *selamis* paid by Defendants Nos. 1 and 2 were Rs. 1,250, and Rs. 312-8 respectively, the rents for the 500 and 150 bighas being Rs. 562-8 and Rs. 140-10. By his *dar-mokurari* patta, the Defendant No. 1 took from Dinanath Gorain a *selami* of Rs. 6,500, reserving an annual rent of Rs. 3,000, while the Defendant No. 2 by her *dar-mokurari* patta, took a *selami* of Rs. 1,800 and reserved an annual rent of Rs. 900. The *selamis* under the *dar-mokurari* pattas were duly paid ; but it does not appear that the lessee ever received actual possession of any of the lands demised. Plaintiffs claim to be entitled to the benefits of these *dar-mokurari* pattas as members of the Gorain family, Dinanath having taken the leases and paid the *selami* as *benamdar* of the joint family. This is not now disputed and the Gorain family is here represented by the Plaintiffs on the one side and Defendant No. 36 and the sons of Defendant No. 37 on the other. On

29th December 1895 Giridhari Singh, Defendant No. 5, purported to execute in favour of Defendant No. 1 a *chhar sanad* admitting all the terms of the patta which had been granted in favour of Defendant No. 1 in respect of the 500 bighas of land. For this he received Rs. 500. On the following day, 30th December 1895, he executed a deed of release in favour of Nagar Singh, Chhatradhari Singh, Dukhit Singh and Amrita Kumari, whereby he purported to release to them the absolute right in 8 annas of Mauza Barora stating that it was their "ancestral *lakheraj mahatran* property." On the 15th April 1902, Defendant No. 5 executed a *maurasi mokurari* patta in favour of his eldest son Ran Bahadur Singh, Defendant No. 6, of the surface and sub-soil rights of the whole Mauza Barora; and the Defendant No. 6 thereupon, by several leases, let out the under-ground rights to different persons; among others, he made a lease, in favour of Defendant No. 35, of 919 bighas. That lease is dated 28th January 1908 and was given in the name of Gopi Nath Gorain, the eldest son of Nanda Lal. Among other persons claiming to be lessees of this property was one Jagannath Marwari, Defendant No. 34, who brought two suits which are the subjects of Appeals Nos. 51 and 121 of 1910 with which we shall presently deal. It should be stated that, though the total area leased out to the Gorains was said to be 650 bighas, the entire area of Barora, as measured, is only 1,113 bighas so that in any case, the Plaintiffs would not be entitled to the sub-soil rights in more than 556½ bighas. As Defendant No. 5 and also Defendant No. 35 had, according to the Plaintiffs, infringed their rights, the Plaintiffs brought these two suits to have it declared that they were entitled to a 10 annas 5 gandas share in the 650 bighas of Mauza Barora and that possession might be given to them by demarcation by metes and bounds jointly with the Defendant No. 35. They asked, in the alternative, that, if it were found that the Defendants Nos. 1 and 2 had no title to the sub-soil beneath any portion of the 650 bighas, a decree might be passed for reduction of the rent in proportion to the area to which they might be found to have no title and for a refund of a proportionate amount of the *selami*. They claimed khas possession of such of the lands as might fall to their share and asked for mesne profits. As a further alternative, they asked that if it were found that Defendants Nos. 1 and 2 had no title whatever to the sub-soil in the 650 bighas, a decree might be passed against Defendants Nos. 1 and 2 for a return of the *selami* which they (Plaintiffs) had paid and any rent which had been recovered against them, such amounts to be refunded with interest.

On the suits coming on for hearing, the learned Subordinate Judge found that the lessors of Defendants Nos. 1 and 2 were khorposhdars of the property, that they held under a maintenance grant made to their ancestor Kumar Bishun Singh, such grant being heritable in the male line and determinable only with the failure of male issue. He decided, however, that the Defendant No. 5 was estopped from denying the right of Defendants Nos. 1 and 2 and the Plaintiffs as conferred by the leases in question. He accordingly decided that the Plaintiffs were entitled to a decree for partition of the sub-soil of Mauza Barora and separate possession of the coal lands falling to their shares. The decrees, in the form in which they have been passed, cannot be supported and moreover are not acceptable to any of the parties except Defendants Nos. 1 and 2. The Plaintiffs have appealed and their appeal is support-

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ed by the other members of the Gorain family who are represented by Defendant No. 36 and the sons of Defendant No. 37. The Respondents, who oppose the appeal, are Defendants Nos. 1 and 2 who are anxious to have the decrees of the Subordinate Judge in these two cases maintained. There is a third party in this case who may be described as the Mahato Defendants. They are in possession by virtue of certain leases and if no relief is given to the Plaintiffs by way of possession, they do not desire to contest the matter. If, however, the Plaintiffs are given anything by way of possession, the Mahato Defendants object, and desire to press the cross-objections which they have filed.

In this Court the Plaintiffs have maintained that the decrees of the Subordinate Judge are based on a wrong assumption of law and, to some extent, of fact. They, therefore, now desire to give up their claim for possession of the coal lands in Mauza Barora and to fall back upon their alternative claim for a return of the *selami* and the rents which they have paid to Defendants Nos. 1 and 2.

The first question to be considered is what were the precise rights of Nagar Singh, Chhatradhari Singh, Dukhit Singh and Amrita Kumari in the lands which they purported to lease out to Defendants Nos. 1 and 2? The evidence on this point is somewhat meagre; but we think that it is sufficiently clear that the several kismats of Nawagarh descended, by the rule of primogeniture, on the eldest sons, maintenance grants being made to the younger branches of the family. Each kismat was, to all intents and purposes, regarded as an impartible estate. Kismat No. III for instance has descended to the eldest sons since the time of Bishun Singh on no less than four occasions and Giridhari Singh, Defendant No. 5, now holds it on those terms. With regard to the character of the khorposh grants, we think that the learned Subordinate Judge has correctly found that these grants were made for the maintenance of the junior branches and were heritable in the male line and ended only with the failure of male heirs. Though Nagar Singh, in his evidence, has declined to admit it, there can be no doubt that that is the nature of the grant. We have an instance of a resumption on the death of Bhowani Singh—the great uncle of Giridhari without heirs. There is one instance of a *sanad* granted to Nagar Singh by Giridhari Singh on 19th March 1868. That merely states that the grantor executes the khorposh *sanad* to the grantee, his sons and grandsons, Moghali rent of Re. 1 having been paid in respect of a 4-anna share in Mauza Barora thus granted. The most important document in this connection is Ex. D9, a decree in suit No. 62 of 1852 dated 24th July 1852. From that the history of these khorposh grants clearly appears. There are other documents (Exs. D to D3 and D5 to D7) also indicating the nature of these grants. These purport to be sales, but are rather leases of khorposh lands, two by Nagar Singh and five by Bhimlal Singh to the Mahatos, and were executed on various dates from 4th December 1867 to 2nd April 1876. They were clearly granted for purposes of cultivation, and in several of them that is expressly stated. We must hold on the evidence before us that these khorposh grants were to the grantee and his descendants in the male line, terminable with the failure of such descendants. That the khorposhdars did not possess the sub-soil rights in the lands granted to them is conceded by all the parties other than Defendants Nos. 1 and 2, and they did not very strenuously contest the point. The interest of a

khorposhdar though more than an interest for one life was nevertheless a limited interest, liable to be defeated at any time by the failure of heirs, and thereupon resumable by the proprietor for the time being. This would not be an interest sufficient to carry with it the sub-soil rights. We hold therefore that Nagar Singh and his co-sharers had no right to make the settlements of the sub-soil rights with Defendants Nos. 1 and 2, which they purported to make.

For Defendants Nos. 1 and 2 it was argued, first, that the Plaintiffs having been granted decrees could not prefer these appeals against them. There is however no provision of law to prevent them. It was open to them, as they had claimed alternative reliefs, to say that the relief granted was not in accordance with law and that they would prefer the other. It is of the less importance in this case, as there are cross-objections by the Gorain Defendants in which the whole matter would be open to review. Moreover, Or. XLI, r. 33, confers on the Appellate Court the power to pass such decree as ought to have been passed or to pass such further or other decree as the case may require.

The next argument for Defendants Nos. 1 and 2 was that Defendant No. 5 was in some way estopped from disputing the title which Nagar Singh and his co-sharers had purported to confer on Defendants Nos. 1 and 2. It was said that the *chhar sanad* of 29th December 1895 and the releases of the following day debarred him. No question however of estoppel really arises as between the Plaintiffs and Defendant No. 5. The sole question is—had Nagar Singh and his co-sharers a title to the sub-soil rights in 8 annas of Mauza Barora as khorposhdars or otherwise, which they could pass on to Defendants Nos. 1 and 2? As khorposhdars they clearly had no such title. The *chhar sanad* and releases could not perfect any such title in them for the simple reason that from 20th November 1876 until 1st July 1901 the estate of Giridhari Singh was being managed for him under the Chota Nagpur Encumbered Estates Act, VI of 1876. By sec. 3 of that Act during the period mentioned and therefore at the date of the deeds in question Giridhari Singh was wholly incompetent to make any such disposition of his property. It was not a case of a merely voidable agreement as the Subordinate Judge appears to think. The *chhar sanad* does not purport to effect an alienation, but as an admission it could not in any way bind the estate to that end. The learned pleader for Defendants Nos. 1 and 2 laid much stress on the letters (Exs. A15, A13, and A14) said to have been written by Giridhari Singh to Defendant No. 1 on 3rd and 22nd February and 10th March 1902. The Subordinate Judge has found these letters to be genuine. We have doubts as to the correctness of that finding; but even if they be genuine in the sense that Giridhari Singh wrote or had them written, they do not carry the case much further. They were evidently written with a purpose, to make out that he, at any rate, was not putting obstacles in the way of Gorains' getting possession. As an assertion of that fact they are palpably false, as the other evidence shows. It follows then that the Plaintiffs' lessors having had no title whatever to the sub-soil and being incapable of conferring such a title on the Plaintiffs, the suit so far as it claimed possession in any form must necessarily fail. We have then to consider the alternative claim for refund of the *selami* and the rents paid. They do not stand on precisely the same footing. So far as the refund of *selami* is concerned the Plaintiffs' claim is in our opinion barred

by limitation. This is not a case of there having been a consideration for the contract, which afterwards failed. If it were, Art. 97 of Sch. II of the Limitation Act, 1877, would apply, and the period would be three years from the date when the consideration failed. Here there was never any title in Defendants Nos. 1 and 2 and the Plaintiffs were never put in possession. There was never any consideration at all for the contract. In that view of the case the article applicable is Art. 62 and the period is three years from the dates when the money was paid, *i.e.*, on 19th May 1901 and 14th January 1901 respectively. As these suits were not filed until 13th August 1909, the claim for refund of the *selami* is clearly barred. The claim for refund of the rents paid appears to us to be equally unsustainable though on somewhat different grounds. It appears that in respect of the 500 bighas three suits were filed against the Plaintiffs and their co-sharers by Defendant No. 1, and decrees obtained on 18th March 1905 for rent for 1309 and 1310, on 12th September 1906 for rent for 1311 and 1312, and on 15th January 1909 for rent for 1313 and 1314. In the case of the first decree the claim is barred by limitation. The other two are within three years before suit filed. Similarly in respect of the 150 bighas Defendant No. 2 filed two suits, No. 37 of 1905 and No. 32 of 1907, and obtained decrees. These amounts, even if paid within the period of limitation, cannot be recovered being moneys paid by compulsion of legal proceedings. The principle, laid down in *Marriot* v. *Hampton* (1), is applicable to this country. The Plaintiffs had an opportunity of raising this question in those suits, and not having done so, they cannot successfully maintain this action for refund on the very same ground. Moreover, the facts of the case point to the conclusion that Defendants Nos. 1 and 2 were fully aware of their lessors' want of title, and entered into the leases with their eyes open.

The result is that except for a declaration that they are no longer liable to pay rent under the leases of 19th May 1901 and 14th January 1901 to Defendants Nos. 1 and 2 respectively, the Plaintiffs' suit must fail. We accordingly modify the decree of the Subordinate Judge, and confine it to the declaration just mentioned. The cross-objections both of the Gorains and of the Mahato have become unnecessary and are dismissed. Under the circumstances we leave the several parties to bear their own costs in both the Courts.

No. 51.

This appeal arises out of suit No. 365 of 1908, which was decided by the Subordinate Judge of Purulia just a year before he decided suits Nos. 331 and 332 of 1909, with which we have dealt in Appeals Nos. 120 and 183 of 1910. The Plaintiff in this suit, which has been dismissed by the Subordinate Judge, is Jagannath Marwari, Defendant No. 34 in the two later suits. He filed this suit to establish his title to, and recover possession of, the sub-soil rights in 500 bighas out of a moiety of Mauza Barora by virtue of two leases for 551 years executed in his favour, one on 24th September 1901 by Nagar Singh and the other on 2nd December 1901 by Chhatradhari Singh, each for 250 bighas. The Plaintiff in this case further claimed under a lease for 999 years dated 17th February 1908 and granted to him by Defendants Nos. 19 to 21, the successors-in-interest of Bhari Mahato, who, the Plaintiff alleged, had on 27th May 1884 purchased from Nagar Singh a one anna share of the said mauza and certain land called "Dhab". The Subordinate Judge in this case held that Nagar Singh and Chhatradhari had no

(1) 7 T. R. 269 (1797).

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right to the sub-soil in Mauza Barora; that they were khorposhdars, the grants for maintenance being tenable for the life of the grantee only, and that the Plaintiff had accordingly taken nothing by the pattas of 1904 or 1908. The suit was dismissed and the Plaintiff has appealed. In order to avoid the expense and trouble of printing a number of papers and a mass of evidence the Plaintiff applied to this Court to dispense with such printing, and obtained an order to that effect on his undertaking to accept and be bound by the findings of fact of the Subordinate Judge. The appeal has proceeded on that footing.

This appeal is analogous to Appeals Nos. 120 and 183 of 1910 and this judgment should be read with reference to our judgment in those appeals.

It was argued for the Appellant that the findings should at least be consistent in all the cases. The same Subordinate Judge has in this suit held that the khorposh grants were only for the lives of the grantees. In the other two suits he has held that they were heritable in the male line and determinable only on the failure of male heirs. The second view is in our opinion the correct one. It does not materially affect this case, inasmuch as in neither view would the khorposhdars possess the sub-soil rights or have the power to alienate them. Then it was urged that Nagar Singh and Chhatradhari both being alive at the date of suit the suit could not be dismissed as regards their interest. The leases to the Plaintiff, however, were only of sub-soil rights, the surface rights being expressly reserved to the lessors. The leases therefore conveyed nothing whatever to the Plaintiff. For the reasons given in our other judgment, no question of estoppel arises which can assist the Plaintiff. The Plaintiff having taken nothing by his leases whether directly from Nagar Singh and Chhatradhari or indirectly through the Defendants Nos. 19 to 21 is not entitled to any relief in this suit. The appeal is accordingly dismissed with costs, one set to be divided between the Defendants-Respondents who have appeared. The rights of the various Defendants as between themselves will not be affected by this judgment.

No. 121.

The suit No. 366 of 1908 out of which this appeal arises relate to certain coal lands in Mauza Pipratarh and Mauza Ottalis. The Plaintiff-Appellant is the same as in Appeal No. 51 of 1910, and he has given a similar undertaking in this case to be bound by the findings of fact of the Subordinate Judge. As the finding in this case is that the title-deed on which the Plaintiff's suit is based is a forgery, it follows that the Plaintiff's suit must necessarily fail. This appeal is accordingly dismissed with costs, one set to be divided between the Defendants-Respondents who appeared.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 813 OF 1912.

MOOKERJEE, J. BEACHCROFT, J. 1914, 28, May.	RUP CHAND GHOSE, Defendant, Appellant, *v.* NARENDRA KRISHNA GHOSE, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 12, 63, Sch. II—Permanent tenure, transfer of—Tenant, transferor or transferee—Tender of rent by transferee, coupled with demand of statutory receipt, if valid tender—Landlord if may insist on giving receipt in another form

The transfer of a permanent tenure under sec. 12 of the Bengal Tenancy Act is complete as soon as the document is regis-

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tered, and a valid transfer under that section operates to discharge the transferor from the liability to pay rent which thereupon passes to the transferee. As a consequence the transferee becomes by operation of law the tenant of the tenure, and the transferor ceases to be the tenant, though he is not thereby necessarily absolved from liability under the terms of the contract between him and the landlord.

Such a transferee when he tenders rent as tenant is entitled under sec. 63, Bengal Tenancy Act, to claim a receipt with his name thereon as that of the tenant.

Where the landlord upon the transferee's demanding it refused to grant such a receipt and proposed to grant another describing the original tenant as still the tenant of the tenure and the transferee as merely the person in occupation thereof:

Held—*That there was a valid tender wrongly refused by the landlord.*

A tender is not vitiated because a receipt is asked.

A tenant who tenders rent with a request for a receipt in the statutory form, does not seek to impose on the landlord any condition on which he is not entitled to insist, and when the landlord refuses to give such a receipt and offers to grant a receipt in a form which would compromise the position of the transferee, there is an improper refusal of a valid tender.

This was an appeal from a decision of H. P. Duval, Esq., District Judge, 24-Parganas, dated 19th February 1912, confirming that of Babu Atul Chandra Batabyal, Sub-Judge, 24-Parganas, dated 20th March 1911.

The material facts of the case will appear from the judgment.

Babus Umakali Mukherjee and *Panchanan Ghose* for *Babu Satya Chandra Chanda* for the Appellant.

Babu Nagendra Nath Ghose for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the eighth Defendant in a suit for arrears of rent. The only point in controversy between the parties relates to the claim for interest. The Defendant contends that he is not liable for the interest; because he made a valid tender of rent to the landlord before the suit was brought and such tender was improperly refused. The Courts below have overruled this objection and have held him responsible for interest. On the present appeal, the contention has been reiterated that there was a valid tender of rent which was not accepted because the tenant asked for a receipt in the statutory form. To appreciate the point in controversy, we must refer briefly to the terms of the contract between the parties.

On the 24th August 1898, Annoda Prosad Mozumdar, represented in this suit by the first seven Defendants, obtained a permanent and transferable tenure from the Plaintiff. The tenure-holder gave collateral security, at the same time, to the landlord for the rent as also for the due fulfilment of various obligations which he undertook under the terms of the contract. On the 19th March 1904, Annoda Prosad Mozumdar transferred the tenure to Rup Chand Ghose, now Appellant before us. Under this conveyance, Rup Chand Ghose undertook to indemnify his vendor if the latter should be ever called upon by the landlord to fulfil his obligations under the terms of the original lease. It was also expressly stated that if the transferee could get his name registered in the books of the landlord, and, on himself furnishing security, could obtain a return of the security bond given by the original tenant,

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the transferee would stand released from his obligation to his vendor. It is the common case of the parties that rent was tendered to the landlord on behalf of the transferee who claimed a receipt whereon his name should be entered as the tenant. The landlord refused to give a receipt in this form, and offered to grant a receipt in which Annoda Prosad Mozumdar was to be named as the original tenant and Rup Chand Ghose was to be described as the person in occupation. The transferee declined to accept a receipt in this form. The result was that the money tendered by him was not accepted by the landlord who subsequently instituted this suit for recovery of arrears of rent with interest and cesses. The substantial question for determination is whether there was a valid tender, as the Appellant maintains, or whether, as the landlord contends, the tender was clogged with such conditions as entitled him to refuse the money. This question must be determined with reference to the rights of the parties as they stood at the time when the tender was made. The Appellant contends that he was the tenant of the tenure at that time, and that under the provisions of the Bengal Tenancy Act he was entitled, on payment of the rent due, to receive a receipt in which his name was bound to appear as that of the tenant. This view has been controverted on behalf of the landlord. In our opinion, the position assumed by the landlord cannot possibly be supported.

It was ruled by this Court in the case of *Kristo Bullubh Ghose* v. *Kristo Lal Singh* (1), that the transfer of a permanent tenure under sec. 12 of the Bengal Tenancy Act is complete as soon as the document is registered; in other words, as stated in *Joy Gobind* v. *Manmotha Nath* (2), a valid transfer under sec. 12 of the Bengal Tenancy Act operates to discharge the transfer from the liability to pay rent which, thereupon, passes to the transferee. This view has been accepted as incontestable in a long series of decisions, amongst which may be mentioned *Chintamoni Dutt* v. *Rash Behary Mondal* (3), *Hemendra Nath Mukerji* v. *Kumar Nath Roy* (4), *Kishori Raman* v. *Ananta Ram* (5) and *Girish Ch. Guha* v. *Khagendra Nath Chatterjee* (6). It follows, consequently, that in the case before us, after the registration of the conveyance executed by the original tenant on the 19th March 1904, the transferee became, by operation of law, the tenant of the tenure; and as a necessary consequence the transferor ceased to be such tenant. This does not, however, imply that the transferor was absolved from liability under the terms of the contract between him and the landlord; it is conceivable that a person may cease to be tenant and yet continue liable to his landlord under his personal covenant. What then were the rights of the transferee in this case? Under sec. 56, cl. (3) of the Bengal Tenancy Act, every tenant who makes a payment on account of rent to his landlord is entitled to obtain forthwith from the landlord a written receipt for the rent paid by him signed by the landlord; and the receipt and counterfoil must specially bear such of the several particulars shown in the form of receipt given in Schedule II as can be specified by the landlord at the time of payment. The form of receipt given in the schedule shows that the landlord must specify the name of the tenant. It follows accordingly that the transferee, when he

(1) I. L. R. 16 Cal. 642 (1889).

(2) I. L. R. 33 Cal. 580 (1906).

(3) I. L. R. 19 Cal. 17 (1891).

(4) 12 C. W. N. 478 (1908).

(5) 10 C. W. N. 270 (1905).

(6) 13 C. L. J. 613 (1911).

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tendered the rent as tenant, was entitled to claim a receipt with his name thereon as that of the tenant. The demand which he made for a receipt in this form was strictly in accord with the provisions of the Statute, and the landlord had no valid reason, if he accepted the money, to withhold the receipt in this form. But it has been argued on behalf of the landlord that the decision of the Judicial Committee in *Naba Kumari Debi* v. *Behari Lal Sen* (7) shows that the transferee would not have been prejudiced if he had accepted a receipt in the form offered by the landlord and should accordingly have accepted such receipt. There are two obvious answers to his contention. In the first place, the landlord did not propose to give the tenant a receipt containing a statement in the terms mentioned in the judgment of the Judicial Committee. In the second place, the landlord proposed to insert in the receipt a statement which would have undoubtedly compromised the position of the transferee; the landlord proposed to describe the original tenant as still the tenant of the tenure and the transferee as merely the person in occupation thereof. This would imply that the original tenant was still the tenant of the tenure, and that the transferee was not the tenant thereof, although he might be in possession of the land under some arrangement with the tenant. In our opinion, the transferee was entirely within his rights when he demanded a receipt in the form prescribed by the Bengal Tenancy Act with a statement therein that he was the tenant. The landlord must consequently be deemed to have improperly declined to accept the money.

But it has been argued for the landlord Respondent that the view just indicated is contrary to well-settled principles of English law and that a tender with a condition or reservation is not a valid tender. In support of this contention, reference has been made to judicial decisions to which we may very briefly refer.

In *Huxham* v. *Smith* (8), a tender of payment was made upon the condition that a particular document should be given up. It was held that it was not a legal tender. In *Griffith* v. *Hodges* (9), Abbott, C. J., said, "No man can insist on a receipt in full of all demands, and if a man makes a tender of money, insisting at the same time on a receipt in full of all demands, I have no doubt that such a tender is bad." In *Cheminant* v. *Thornton* (10) a person called upon his creditor, tendered him ten sovereigns and said he might take those ten sovereigns in full of his demand. It was ruled by Abbott, C. J., that the tender "was not good, being made in full of the demand." In *Peacock* v. *Dickerson* (11) the debtor offered the creditor three pounds, three shillings and eight pence in cash, which the creditor was willing to take in part, but the debtor said that he owed him no more and took up the money again and would not let the creditor take it in part. Abbott, C. J., said, "this tender is not good, a party tendering money should tender it without making any terms and should leave it still open to the one party to say that more was due, and to the other that the sum tendered was sufficient." In *Mitchell* v. *King* (12), Vaughan, B., said, "a tender, to be legal, must be unconditional. If the money is put down only on condition that a party would take it as a settlement, that is not

(7) I. L. R. 34 Cal. 902 at p. 908 (1907).

(8) 2 Camp. 19 (21); 11 R. R. 65' (1809).
(9) 1 C. and P. 419 (1824)
(10) 2 C. and P. 50 (1825).
(11) 2 C. and P. 51 (1825).
(12) 6 C. and P. 237 (1833)

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a good tender. A tender clogged with the terms that the money is to be taken as a settlement is not good." To the same effect are the decisions in *Jennings* v *Major* (13), *Sutton* v. *Hawkins* (14), *Hastings* v. *Thorley* (15), and *Robinson* v. *Ferreday* (16). It may be observed, however, with regard to the case of *Hastings* v. *Thorley* (15) that it was subsequently doubted by Lopes, J., in *Jones* v. *Bridgman* (17) and a more liberal view has sometimes been taken. In *Bowen* v. *Owen* (18), a tenant sent a person to his landlord with a letter saying "I have sent with the bearer a sum of twenty-five pounds, five shillings and seven pence to settle one year's rent of Nautypain" and the bearer informed the landlord that he had the money with him to pay; but the latter refused, saying that there was more than that due. The bearer left, but afterwards returned and said that he had a few pounds in his pocket in addition to the sum named in the letter; but the landlord again refused, saying there was more due. It was argued on the landlord's behalf that these offers, coupled with the letter, amounted only to a conditional tender and the learned Judge who tried the case ruled that that was so. But the King's Bench held differently, Erle, J., saying, "the person making a tender has the right to exclude presumption against himself by saying 'I pay this as the whole that is due to you'; but if he requires the other party to accept it as all that is due, that is imposing a condition, and when the offer is so made, the creditor may refuse to consider it as a tender." The cases of *Strong* v. *Harvey* (19) and *Foord* v. *Noll* (20) support the same view. But these cases are of no assistance to the Respondent. The fundamental principle which underlies them is that the debtor who made the tender sought to impose a condition on which, it was held, he was not entitled to insist under the law. We need not now consider whether the view taken in these cases should be applied in similar cases in this country as embodying a rule of justice, equity and good conscience. In so far as this Court is concerned, it was ruled in the case of *Jagat Tarini Dassi* v. *Naba Gopal Chaki* (21) that a tender is not vitiated because a receipt is asked. This is in accordance with the decision in *Jones* v. *Arthur* (22) and *Richardson* v. *Jackson* (23), though a different view has sometimes been taken [*Laing* v. *Meader* (24), *Cole* v. *Blake* (25)]. It is plain, in the case before us, that the transferee as tenant was entitled, under the provisions of the Bengal Tenancy Act, to demand a receipt in a particular form. When he tendered the money with a request for a receipt in the statutory form, he did not seek to impose on the landlord any condition on which he was not entitled to insist, and it follows that the money validly tendered was improperly refused by the landlord.

The result is that this appeal is allowed, the decree of the District Judge varied and the claim for interest disallowed. The Appellant will have his costs in all the Courts, and a self-contained decree will be drawn up in this Court. In view of the conduct of the Respondent who has persist-

(13) 8 C and P. 61, 64 (1837).
(14) 8 C. and P. 259 (1838).
(15) 8 C. and P. 573 (1838).
(16) 8 C. and P. 758 (1839)
(17) 39 L. T. 500 (1878).
(18) 11 A. and E. 130 (N. S.) (1847).
(19) 3 Bingham 304 (1825).
(20) 2 D. (N. S.) 617: s. c. 12 L. J. C. P. 2 (1842).
(21) 5 C. L. J. 270: s. c. I. L. R. 34 Cal. 805 (1907).
(22) 8 Dowl. 442; 59 R. R. 583 (1840).
(23) 8 M. and W. 291 (1841).
(24) 1 C. and P. 257 (1824).
(25) Peake 179 (1793).

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ed in an obviously unfounded and vexatious claim, we assess the hearing fee in this Court at five gold mohurs.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1476 OF 1911.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
14, March.

W. M. GRANT & ors., Plaintiffs, Appellants,
v.
HAR SAHAY SINGH & ors., Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 50 (2) —Slight variations in the rent paid with corresponding variations in area—Presumption of permanency, if arises

Where a raiyat proved that for over 20 years, that is to say, from 1882 he had been paying the same rent for the holding :

Held—*That the presumption arising under sec. 50 (2) of the Bengal Tenancy Act that he had held the land at a uniform rate of rent from the time of the Permanent Settlement was not rebutted by the landlord proving slight variation in the rents paid between 1864 and 1878, which was sufficiently explained by a very nearly corresponding variation in the area.*

HURONATH v. AMIR (1) *and* ANUNDLOLL v. HILLS (2), *relied on.*

BISSESSUR v. WOOMACHURN (3) *and* GOPAL MUNDUL v. NOBBO KISHEN (4), *referred to.*

This was an appeal preferred on the 16th June 1911 against a decree of J. C. Twidell, Esq., District Judge of Zilla Bhagalpur, dated 30th January 1911, affirming that of Maulvi Shamsuddin Hyder, Assistant Settlement Officer of Barh, dated the 8th August 1910.

The material facts will appear from the judgment.

Babus Umakali Mukerjee and *Sailendra Nath Palit* for the Appellants.

Babu Khettra Mohan Sen for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal on behalf of the Plaintiffs in a suit under sec. 106 of the Bengal Tenancy Act. The Defendants have been entered in the record-of-rights as raiyats holding at a fixed rate of rent. The area in their occupation is stated to be 43 bighas, and the rent payable in respect thereof Rs. 101-6-9. The Plaintiffs ask for a declaration that the Defendants are not raiyats at a fixed rate of rent.

In the first place it is plain that the entry in the record-of-rights must be presumed to be correct till the contrary is shown. In the second place the Defendants have established that since 1882 they have been in occupation of 43 bighas of land and have paid rent for the same at the rate of Rs. 101-6-9 a year. Consequently, the statutory presumption mentioned in sub-sec. (2) of sec. 50 of the Bengal Tenancy Act arises. That sub-section provides that "if it is proved in any suit or other proceeding under this Act that either a tenure-holder or raiyat and his predecessors-in-interest has held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement. The question in controversy is, whether the landlords

(1) 1 W. R. 280 (1842)
(2) 4 W. R. ; Act X Rulings, p. 33 (1865).
(3) 7 W. R. 44 (1867).
(4) 5 W. R. ; Act X Rulings, p. 83 (1866).

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have shown the contrary within the meaning of this sub-section. The landlords have, for this purpose, produced their collection papers. These papers show that in 1864 the tenants held 36 bighas 19 cottahs at a rent of Rs. 92-6; in 1865, 38 bighas 10 cottahs at Rs. 94-12-5, in 1868, 39 bighas at Rs. 95-6-9; in 1874, 38 bighas 10 cottahs at Rs. 94-10-9; in 1875, 41 bighas 10 cottahs at Rs. 97-10-9; and in 1878, 43 bighas at Rs. 101-5-9. It has been argued on behalf of the landlord that these figures show that the Defendants have not held at a rent or rate of rent which has been uniform from the time of the Permanent Settlement. In our opinion, this contention cannot be supported.

It was pointed out by this Court in the case of *Huronath* v. *Amir* (1), that a small variation which was unexplained was not sufficient to rebut the presumption which arose under sec. 4 of the Bengal Rent Act of 1859. It was similarly observed in the case of *Anundloll* v. *Hills* (2), that an unexplained variation of one rupee in a total *jama* of Rs. 60 was not a material variation, so as to deprive the tenant of the benefit of the presumption of uniform payment from the time of the Permanent Settlement. In the case before us, no doubt, there is a small variation in the rent; at the same time, there is a variation in the area as well; consequently, the inference may legitimately be drawn, as, indeed, has been done by the District Judge, that the variation in the rent was due to variation in the area. This view does not militate against the decision in *Bissessur* v. *Woomachurn* (3). In that case, there was a variation of the rent from Rs. 11-13 to Rs. 13-4 and it was argued on the authority of the decision in *Anundloll* v. *Hills* (2), that the statutory presumption had not been rebutted; but this contention was overruled, because it was established that the rent had been enhanced on the occasion of a transfer of the holding. In the case before us, there are no circumstances to support a possible hypothesis that the tenants did at any time submit to an enhancement of their rent [*Gopal Mundul* v. *Nobbo Kishen* (4)], on the other hand, the small variation in the rent has been sufficiently explained by a very nearly corresponding variation in the area. The presumption under sub-sec. (2) of sec. 50 of the Bengal Tenancy Act cannot consequently be deemed to have been rebutted.

The result is that the decree of the Court below is affirmed, and this appeal dismissed with costs.

Appeal dismissed.

(1) 1 W. R. 230 (1842).
(2) 4 W. R.; Act X Rulings, p. 38 (1865).
(3) 7 W. R. 44 (1867).
(2) 4 W. R.; Act X Rulings, p. 88 (1865).
(4) 5 W. R.; Act X Rulings, p. 83 (1866).

[CIVIL REVISIONAL JURISDICTION.]

Rule No. 444 of 1914.

Stephen, J.
Mullick, J.
1914,
5, May.

Damodar Misra and anr., Plaintiffs, Petitioners,
v.
Hrishi Naik and ors., Defendants, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 9, r. 13—Compromise petition purporting to be by all the Defendants filed by those actually present in Court—Decree passed on such compromise petition—Subsequent repudiation by Defendants not present at filing of petition—Jurisdiction of Court to set aside, decree as ex-parte *decree under Or. 9, r. 13.*

The Petitioners instituted a suit for declaration of their title to, and for possession of, certain lands. Two of the Defendants (Nos. 4 and 5) filed a petition of compromise and asked for a decree, so far as they were concerned, on that compromise and an ex-parte *decree against the other*

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Defendants. The Court, however, ordered fresh service on the other Defendants, and subsequent thereto Defendants Nos. 4 and 5 appeared in Court with a petition of compromise purporting to be executed by Defendants Nos. 1 to 3 as well as by themselves. On this petition a decree was made in terms of the compromise. Afterwards Defendants Nos. 1 to 3 put in a petition to the Court stating that Defendants Nos. 4 and 5 had no authority to present the petition of compromise on their behalf, that no summons had been served on them, and that the petition was fraudulently represented as being made by them. The Court acting under Or. 9, r. 13, C. P. C., set aside the decree and ordered a re-trial of the case.

Held—*That the Judge when he made his order was under the impression that all the parties in the case were before him and that the petition was the petition of all the parties; consequently in granting the petition he did not intend to make it* ex-parte *and the decree could not be treated as an* ex-parte *one, and consequently Or. 9, r. 13, C. P. C., did not apply.*

This was a Rule granted on the 17th April 1914 against the order of Babu N. C. Chandra, Munsif of Comillah, dated the 28th February 1914.

The material facts will appear from the judgment.

Babus Provas Chandra Mitter and *Debendra Narain Bhattacharjee* for the Petitioners.

Babu Sushil Madhab Mullick for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

In this case the Petitioners before us instituted a suit for declaration of their title to, and for possession of, certain lands. The suit was instituted on the 7th of January 1913 against five Defendants. On the 9th of April in the same year, Defendants Nos. 4 and 5 filed a petition of compromise and asked for a decree so far as they were concerned on that compromise, and an *ex-parte* decree against the other Defendants. Fresh service, however, was ordered on the other Defendants and, on the 7th of May, Defendants Nos. 4 and 5 appeared in Court with a petition of compromise purporting to be executed by Defendants Nos. 1 to 3 as well as by themselves. On this petition a decree was made in terms of the compromise. Afterwards, Defendants Nos. 1 to 3 put in a petition to the Court stating that Defendants Nos. 4 and 5 had no authority to present the petition of compromise on their behalf, that no summons had ever been served on them, as had been ordered, and that the petition was fraudulently represented as being made by them. On this, the Court, acting under Order IX, rule 13, C. P. C., set aside the decree that had been passed and ordered the case to be set down for trial in the usual way. A Rule has now been granted to the Plaintiffs calling upon the Opposite Parties to show cause why the order setting aside the decree should not be set aside.

The rule must be made absolute for the reason that the decree in this case cannot be treated as an *ex-parte* one and that consequently Order IX, rule 13, C. P. C., does not apply. It is argued before us that, on the evidence that has been given, it appears that the petition of compromise was not the petition of Defendants Nos. 1 to 3, and that consequently they cannot be considered to have appeared before the Court and that the decree was *ex-parte*. We cannot dispose of the case from this point of view. The Judge, when he made his order, was under the impression that all the parties in the case were before him and that the petition was the petition of all the parties. Consequently, in granting the petition he did not intend to make

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it *ex-parte* and it does not appear that he did so on the face of the record. We cannot go behind the record to decide whether the Defendants Nos. 1 to 3 were properly represented or not. That would be begging the question which was sought to be raised before the Court.

The Rule is made absolute with costs—two gold mohurs.

Rule made absolute.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 4829 OF 1912.

STEPHEN, J.
D. CHATTERJEE, J
1912,
13, December.

HARI NAMA DASS and others, Defendants, Petitioners,
v.
SHEIKH NAJU and ors., Plaintiffs, Opposite Party.

Specific Relief Act (I of 1877), sec. 9—Possession if includes joint possession—Suit by co-sharer.

The words of sec. 9 of the Specific Relief Act refer to exclusive possession and the Court in a suit under that section has no jurisdiction to grant joint possession to the Plaintiff.

No order under this section can be made in favour of a Plaintiff who claims an undivided share in the property from which he and his co-sharers have been ousted.

This was a rule granted on the 22nd December 1912 against an order of the Munsif of Kishorganj, dated 16th April 1912.

The material facts appear from the judgment of the Munsif which was as follows:—

This is a suit for recovery of *khas* possession of the land in suit under sec. 9 of the Specific Relief Act. The Defendants Nos. 3 and 4 filed a written statement. The Defendants Nos. 10, 12 and 13 took time to file written statement but did not file any. The other Defendants did not appear though duly summoned. The point that arises for consideration is, were the Plaintiffs in possession of the land within 6 months before suit? The Plaintiff No. 3 by a petition in Court withdrew from the suit. The suit was conducted by the other Plaintiffs. It would appear from the evidence adduced by the Plaintiff that the Plaintiffs were in possession of the land before dispossession by the Defendants. The share of Alam in the *girbi* land was 8 annas and it is clear that he was in joint possession of 8 annas share with the Plaintiffs. The Defendants are trespassers in the land. I am disposed to think that Plaintiff No. 3 has withdrawn from the suit at the instance of Guru Prosad Bhowmic who wants thus to defeat the Plaintiffs' claim. As the Defendants are trespassers, I think, however, that they are liable to be evicted by the Plaintiffs Nos. 1 to 2.

"ORDERED.—That the suit be decreed with costs on contest against the Defendants Nos. 3 and 11 and *ex-parte* against others and the Plaintiff do recover *khas* possession of the land by ejecting the Defendants."

Babu Harendranarain Mitra for the Petitioner.

Babu Gobind Chandra Dey Roy for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

In this case three Plaintiffs brought a possessory suit under sec. 9 of the Specific Relief Act claiming possession of certain property. During the pendency of the suit Plaintiff No. 3 withdrew from it leaving Plaintiffs Nos. 1 and 2 entitled according to their case to the possession of the 8 annas share of the property. The lower Court holding the Defendants to be trespassers and being disposed to think

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that Plaintiff No. 3 had withdrawn from the suit in a collusive manner, gave judgment in favour of the Plaintiffs Nos. 1 and 2 in respect of the whole.

A Rule has been granted calling upon the opposite party to show cause why this order should not be set aside on the ground that the Munsif acted without jurisdiction in decreeing the suit, after Plaintiff No. 3 who was admittedly in joint possession of the land with the other Plaintiffs had withdrawn from it. We are of opinion that the Rule must be made absolute. The question involved in this case is a very short and simple one, namely, whether a party entitled to an 8 annas share in a property is entitled to proceed under sec. 9 of the Specific Relief Act when the dispossession is in respect of the whole. This turns on the question whether possession in this section includes joint possession, and we have to decide it without the assistance of any authority. Looking at the words of the section as they stand, we are of opinion that they refer to exclusive possession and the Court had no jurisdiction to grant joint possession under the section. We have treated the case as being one where a party seeks possession of his share only of property from which he himself and his co-sharers have been dispossessed and it is incompetent for the Court to give possession of the whole of the property in such a case.

The Rule must accordingly be made absolute and the order of the Munsif set aside.

The case is one in which we think each party must bear its own costs.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

APPEALS NOS. 635 AND 673 OF 1913.

SHARFUDDIN, J.
TEUNON, J.
1913,
Heard, 26 and 27, August.
Judgment, 27, August.

DWARKA SINGH, Appellant,
v.
KING-EMPEROR, Respondent.

Criminal Procedure Code (Act V of 1898, sec. 239—Joint trial of principal and abettor—Prejudice—Re-trial by another Judge.

Where there were three charges under secs. 408 and 408/109, I. P. C., against two accused persons in respect of three sums said to have been defalcated on three different dates, and the Sessions Judge tried the two accused jointly in spite of objection taken by them:

Held—*That under sec. 239, Cr. P. C., judicial discretion was given to the Court to try the principal offender and the abettor either jointly or separately, and the manner in which this discretion should be exercised must depend on the facts of each case.*

The High Court, on a consideration of the circumstances of the case, held *that the accused should not have been tried on the charges jointly, and set aside the convictions and sentences, and directed that the re-trial, if any, should take place before another Sessions Judge.*

This was an appeal against the order of N. K. Dutt, Esq., Sessions Judge of Purnea, dated the 27th June 1913, convicting the Appellants of the charges mentioned below, and sentencing them to three years' rigorous imprisonment under each charge, the sentences running concurrently. The two Appellants were charged under secs. 408 and 408/109, I. P. C., in respect of a sum of Rs. 2,500, committed on 13th Chait 1968 Sambat, corresponding to 26th March 1912, and of Rs. 2,150, committed on 16th Chait 1968 Sambat, corresponding to 29th

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March 1912. The accused No. 1 Dwarka was further charged under sec. 408, I. P. C., in respect of a sum of Rs. 8,620, committed on 22nd Assin 1696 Sambat, corresponding to 8th October 1912, and the accused No. 2 Upendra was further charged under secs. 408/109, I. P. C., in respect of the said sum of Rs. 8,620, committed on the same date—8th October 1912.

Although objection was taken, the Sessions Judge tried the two Appellants jointly.

The facts alleged on behalf of the prosecution are shortly these: One Rai Dhanpat Singh Nowlakha Bahadur has an extensive business in purchase and sale of grains, etc., having his sadar office at Azimgunj, in the district of Murshidabad, and branch offices at Sahebgunj and other places and a sub-office at Katihar, subordinate to the office at Sahebgunj. Accused No. 1 Dwarka was the *gomasta* at Katihar and accused No. 2 Upendra was the *gomasta* at Sahebgunj. The accused conjointly and in collusion with each other misappropriated the aforesaid sums of the firm, *viz.*, Rs. 2,500, entering the same in the name of a bogus person Ram Prosad and Rs. 2,150 in the name of a bogus person Shankar Mahto in the account books. The Dewan Chhogmul who was in charge of the entire business and who remained at Azimgunj had suspicion against Dwarka about Assin 1969 and came to Katihar with accused No. 2 on the night of the 20th Assin last, demanded from accused No. 1 Dwarka, on the 21st Assin, his *rokar* book which he made over on 22nd Assin. The balance in hand was found to be Rs. 8,620-0-3, the Dewan demanded the same, Dwarka made promises and took time, but did not pay. So a complaint was lodged against Dwarka alone on 16th October 1912. The accused No. 2 Upendra became the complainant. Within five or six days suspicion was aroused against Upendra and he was made a co-accused subsequently.

In No. 635

Messrs. P. L. Roy and *A. K. Fuzlal Huq* for the Appellant.

In No. 673

Babus Dasarathi Sanyal and *Debendranarain Bhattacharjee* for the Appellant.

In No. 635

Mr. K. N. Chaudhuri and *Babus Jyotish Chunder Bhattacharjee* and *Hemendra Nath Sen* for the Crown.

In No. 673

Mr. K. N. Chaudhuri for the Crown.

The JUDGMENT OF THE COURT was as follows:—

These are two appeals by two Appellants from the same judgment of the learned Sessions Judge who tried their cases together. There were three charges under sec. 408 and sec. 408 read with sec. 109 of the Indian Penal Code, against both the Appellants. The first charge related to a sum of Rs. 2,500 said to have been defalcated on 26th March 1912; the second charge related to a sum of Rs. 2,150 said to have been defalcated on 29th March 1912; and the third and last charge was with reference to a sum of Rs. 8,620 said to have been defalcated on 8th October 1912.

The first ground taken on behalf of the Appellants is that there has been a misjoinder of charges; and the second is that the two Appellants should not have been tried jointly. Under sec. 239, Cr. P. C., judicial discretion has been given to the Court to try the principal offender and the abetter either jointly or separately; and the manner in which this discretion should be exercised must depend on the facts of each case. We have gone through the judgment of the lower Court and we are of opinion that the case before the lower

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Court was of such a nature that the two accused should not have been tried on the charges jointly.

An objection was taken verbally by one of the Appellants, namely, Dwarka Singh, on 11th June 1913, the date on which the trial began, that he ought not be tried jointly with Upendra—the other accused, and a written application was put in on his behalf on 12th June 1913, re-iterating the prayer made verbally on the first day of the trial that he should be tried separately and not jointly with the other accused; but, in spite of this objection, the lower Court tried them together. We find that, by the joint trial of the two accused complications have arisen, and that the trial would have been much simpler if the two accused had been tried separately. We are not prepared to say that the Appellants have not been prejudiced by the procedure adopted.

We, therefore, set aside the conviction and the sentences passed on the two Appellants and direct that, if the Crown be so advised, the two Appellants be re-tried separately on the charges stated in the charge-sheet. The Crown may, on the re-trial of the two accused, proceed on the three charges mentioned in the charge-sheet, or confine itself to any one or two of them; and the trial will then proceed in accordance with the directions given.

A verbal application has been made by the learned Counsel on behalf of the Appellants that, if there is to be a fresh trial of the two accused separately, the trial in each case should take place before another Sessions Judge. We are told that Bhagalpur is the nearest Sessions Division to Purnea; and we, therefore, direct that the re-trial, if the Crown proceeds against the two accused separately, shall be before the Sessions Court at Bhgalpur.

Pending re-trial, the Appellants will remain on the same bail.

Conviction set aside;
Re-trial ordered.

[CRIMINAL REVISIONAL JURISDICTION]

REV. No. 998 OF 1914.

HOLMWOOD, J.
RICHARDSON, J
1914,
11, August.

CHINTAMONI JENA & ors., 1st Party, Petitioner,
v.
JAGANNATH RAMANUJA DAS & anr., 2nd Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145—Omission of Magistrate to give effect to presumption arising from recently published record-of-rights, if a question of jurisdiction.

The omission of the Magistrate in making an order under sec. 145, Cr. P. C., to give effect to the presumption arising from the entries in a recently published record-of-rights is not a question going to the jurisdiction of the Magistrate, and the High Court cannot interfere on that ground.

This was a rule granted on the 14th June 1914, against an order of A. P. Das, Esq., Deputy Magistrate of Puri, dated 8th April 1914, declaring under sec. 145, Cr. P. C., the second party to be entitled to possession of the disputed land until evicted therefrom in due course of law.

The rule was issued on the ground, amongst others, that there should have been separate proceedings in respect of the several plots claimed by the several sets of tenants, and, secondly, on the ground that effect has not been given to the presumption arising from entries in a finally published record-of-rights.

The material portion of the Magistrate's judgment is as follows :—

"From the evidence on record, I have been convinced that the first party is not

in possession of the property in dispute. I have examined the last settlement khatians and find that the disputed land stood in the name of the predecessors of the second party at the last settlement.

"The second party have given overwhelming evidence regarding their possession of the land in dispute.

"I find that some of the first party have got their names recorded at the Revision Settlement for a portion of the disputed area, but the rent is *dhulibhag*; and it is a known fact that landlords let out a portion of their *nij-dakhal* area to tenants for a limited term on *bhag*.

"I find the second party in possession and declare that the second party be entitled to possession of the disputed area until evicted therefrom in due course of law, and I also direct that all disturbance of such possession be forbidden until such eviction."

Babus Girish Chandra Pal and *Nalini Chandra Pal* for the Petitioners.

Messrs. B. Chakrabarti and *J. Chaudhuri* and *Babu Suresh Chandra Chakraburti* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The question which appears to be one of jurisdiction on the rule really depends upon the second ground of the rule which is that effect has not been given to the presumption arising from the entries in a recently published record-of-rights. That certainly is not a question going to the jurisdiction and we therefore cannot interfere. We at first thought that the other ground that there should have been separate proceedings in respect of the several plots claimed by the several sets of tenants was a separate point going to the jurisdiction. But we find that this is not so. The other sets of tenants have not come here at all and the present Applicants have only come upon the ground that they had obtained tenant-rights and possession by a recently published record-of-rights. It is needless to say that whatever presumption may be raised by such a record, it does not in itself establish the *factum* of possession, and that if the Magistrate decides the *factum* of possession wrongly, that is not a question with which the High Court can interfere under the Charter, it not being a question of jurisdiction.

The Rule is discharged.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION]

REV. No. 807 OF 1914.

SHARFUDDIN, J.
TEUNON, J.
1914,
24, June.

SADANANDA MONDAL,
1st Party, Petitioner,

KRISTA MONDAL,
2nd Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 145, 356—Memorandum of evidence if sufficient in a proceeding under sec. 145—Applicability of sub-sec. (3), sec. 356

Where in a proceeding under sec. 145, Cr. P. C., the Magistrate only made a memorandum of the evidence purporting to act under sub-sec. (3), sec. 356:

Held *(in setting aside the final order of the Magistrate under sec. 145, Cr. P. C.)*—*That the provisions of sub-sec. (1), sec. 356, are imperative.*

That the provisions of sub-sec. (3) apply only to cases in which the evidence recorded under the first sub-section is not recorded in the Magistrate's own hand.

This was a Rule granted on the 18th May 1914, against an order of S. N. Das, Esq., Sub-Divisional Magistrate of Magura, dated the 18th March 1914, declaring under sec. 145, Cr. P. C., the second party to continue in possession of

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the subject in dispute until evicted therefrom by the decision of a competent Civil Court.

The material facts will appear from the judgment.

Babus Hari Bhusan Mukherjee and *Satish Chandra Ghuttak* for the Petitioner.

Babu Norendra Kumar Bose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule, issued at the instance of the first party to proceedings under sec. 145, Cr. P. C., called upon the District Magistrate and the Opposite Party to show cause why the final order made in these proceedings should not be set aside on two grounds, namely, *first*, that the evidence had not been recorded in the manner provided by sec. 356, Cr. P. C., and, *secondly*, on the ground that the Magistrate did not receive the oral and documentary evidence tendered by the Petitioner. The District Magistrate has submitted an explanation. From this explanation we find that in fact the trying Magistrate did receive all the evidence, oral or documentary, that was offered. With regard to the first ground, what the Magistrate says is that the Sub-Divisional Magistrate, that is to say, the trying Magistrate made a memorandum of evidence in the manner required by the third sub-section to sec. 356, Cr. P. C., and that the making of that memorandum should be regarded as a sufficient compliance with the requirements of the law. We are unable to accept this contention. The provisions of sub-sec. (3), sec. 356, Cr. P. C., apply only to cases in which the evidence recorded under the first subsection is not recorded in the Magistrate's own hand. The provisions of the first subsection are imperative, and we are unable to condone the non-compliance therewith.

We therefore make this Rule absolute, and set aside the order complained of.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 809 AND 810 OF 1914.

SHARFUDDIN, J. TEUNON, J. 1914, 17, June.	ASRABUDDIN SARKAR and others, Petitioners, *v.* KALIDAYAL MULLIK and others, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 195, 476—Indian Penal Code, secs. 471, 474—Using as genuine a forged document—Filing a forged document as coming from the custody of the person by whom it purported to be held, if constitutes 'user'—Offence committed by such act, sanction if necessary for prosecution for—Possession of forged document, knowing it to be forged and intending to use it as genuine, prosecution for, if lies without sanction—Stay of criminal proceedings pending determination of civil suit

Where in a case under sec. 474, I. P. C., the prosecution story was that the accused who was the Plaintiff in a rent suit himself filed a kabuliyat *and an* amalnama *which were forged and which purported to be filed by the Complainant, the Defendant in the rent suit :*

Held *That the act constituted a user within the meaning of sec. 471, I. P. C., and the offence committed was one under that section and in respect of that offence sanction under sec. 195 or an order under sec. 476, Cr. P. C., was necessary.*

That no sanction is necessary for a prosecution under sec. 474, I. P. C.

That the decision of the issues in the rent suit being largely dependent on the question whether the documents in question were or were not genuine, it was expedient that the criminal proceedings should be deferred pending the final disposal of the rent suit.

These were Rules granted on the 18th

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May 1914, against the proceedings taken against the Petitioners under secs. 465, 465/109, 474, I. P. C., by the Sub-Divisional Magistrate of Gaibanda, by his order dated 14th January 1914, an application for a reference of which order to the High Court for revision was rejected by M. Yusuf, Esq., Sessions Judge, on the 30th March 1914.

On the complaint of the Opposite Party, the Petitioner and others were summoned by the Sub-Divisional Magistrate of Gaibanda, under sec. 474, I. P. C., with respect to their being in possession of a *kabuliyat* and an *amalnama*, knowing the same to be forged and intending to use them as genuine in a rent suit pending at the time before the Munsif of Gaibanda.

The facts will appear from the judgment.

Babu Brojendro Nath Chatterjee for Petitioners in both cases.

Mr. S. P. Sinha and *Babu Surendra Nath Guha* for Opposite Party in No. 809.

Mr. Pugh and *Babu Surendra Nath Guha* for Opposite Party in No. 810.

The JUDGMENT OF THE COURT was as follows :—

In these two Rules it appears that two prosecutions under sec. 474, I. P. C., have been instituted against the Petitioners in respect of certain documents, namely, in each case a *kabuliyat* and an *amalnama*. It further appears that the Petitioners instituted a rent suit (No. 324 of 1913), and in that suit summoned the Complainants in the criminal proceedings to produce the documents in question, each a *kabuliyat* and an *amalnama*. The production of the documents followed. The case for the Complainants is that the documents are not genuine and were in fact produced not by the Complainants but by the Plaintiffs, the Petitioners before us. The contentions of the Petitioners before us are that a sanction under sec. 195 or an order under sec. 476 of the Code of Criminal Procedure is necessary before they can be prosecuted, and that in any case, pending the decision of the rent suit, the prosecution should be stayed.

On behalf of the Complainants, Opposite Parties, it is contended, *first*, that the documents having been merely filed, there has been no user, and, *secondly*, that the prosecution under sec. 474 requires no sanction. The second contention cannot be disputed, and in support of the first, reference is made to the case of *Amibca P. Singh* v. *Emperor* (1). But in at least three subsequent cases [*Rati Jha* v. *Emperor* (2), *Mobarak Ali* v. *Emperor* (3) and *Krishna P. Mondal* v. *Robindra Nath Dunda* (4)], it has been held that at least in certain circumstances the filing of a document may constitute user. On the case for the prosecution, in the present instance, the documents were produced by the Petitioners as documents coming from the custody of the Complainants. We are of opinion that this, if established, constitutes a user within the meaning of sec. 471, I. P. C. It follows that the offences, if any, committed are under sec. 471 of the Code, and in respect of those offences sanction under sec. 195 or an order under sec. 476, Cr. P. C., is necessary.

Apart from this, it is not disputed that the decision of the issues in the rent-suit depends largely on the question whether the documents in question are or are not genuine. That being so we are of opinion that it is expedient that the criminal proceedings should be deferred pending the final disposal of the rent suit. After that suit is disposed of, it will be open to the

(1) I. L. R. 25 Cal. 820 (1908).
(2) I. L. R. 39 Cal. 463 (1911).
(3) 17 C. W. N. 94 (1912).
(4) 18 Indian Cases 99

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Courts and to the Complainant to take further appropriate action. These Rules are therefore made absolute, and the present criminal proceedings quashed.

The Petitioners will now be discharged from their bails.

Rule made absolute.

[CRIMINAL REFERENCE.]

REF. No. 145 OF 1914.

SHARFUDDIN, J. TEUNON, J. 1914, 11, August.	THE EMPEROR *v.* RAFFI RAUT and others.

Criminal Procedure Code (Act V of 1898), sec 476—Indian Penal Code (Act XLV o, 1860), sec. 182—Calling for a report from interested party as to truth of complaint, propriety of—Order for prosecution, without sufficient enquiry into truth of complaint.

The Petitioners filed an application before the Sub-Divisional Magistrate praying for proceedings under secs. 144 and 107, Cr. P. C., against several servants of a certain factory, whereupon the Magistrate called for a report from the Manager of the factory, and on receipt thereof required the Petitioners to show cause against prosecution under sec. 182, I. P. C., and then after examining some witnesses on each side, but without examining the Petitioners themselves, made an order under sec. 476, Cr. P. C., directing their prosecution for an offence under sec. 182, I. P. C.

Held—*That the order of the Magistrate in calling for a report from the Manager of the factory was open to great objection.*

That the accused being the servants of the factory, the Manager was an interested party and he ought not to have been asked to make a report in these judicial proceedings.

Held *(in setting aside the order for prosecution)—That further enquiry should be made into the truth of the Petitioners' complaint, and they themselves should be examined if they chose to give evidence.*

This was a reference from the Sessions Judge of Darbhanga (R. L. Ross, Esq.), dated 17th June 1914, recommending that the order of the Sub-Divisional Magistrate of Samastipur, dated the 26th May 1914, directing under sec. 476, Cr. P. C., the prosecution of the Petitioners under sec 182, I. P. C., be set aside for reasons set forth in the letter of reference.

The letter of reference was as follows :—

"On 8th April 1914, the 15 Petitioners presented a petition to the Sub-Divisional Magistrate of Samastipur, complaining against 9 persons, servants of the Birauli Factory, and praying for proceedings against them under secs. 144 and 107, Cr. P. C. The substance of the petition was that these 9 persons wanted to take the Petitioners to the factory to make them execute agreements for the cultivation of indigo forcibly, and that they threatened them with the institution of civil and criminal cases; that on 6th April 1914, they came to the houses of the Petitioners to take them forcibly and abused and threatened to beat them. On this petition the Magistrate passed the following order :—'To Mr. Wylde of Birauli Factory. Please report on the circumstances of this petition. Put up on 25th April, 1914.' A report was submitted by Mr. Danby, Manager of Dholi Concern, to the effect that the petition was false. On receipt of this report the Magistrate passed the following order : 'Report received. Petitioners to show cause on 11th May why they should not be prosecuted under sec. 182, I. P. C.' Witnesses were examined on both sides and the Magistrate drew up a proceeding under sec. 476, Cr. P. C., recommending the prosecution of the Petitioners under sec. 182.

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"The order recommended for revision :—The proceeding under sec. 476.

"The grounds upon which, in the opinion of this Court, the order should be reversed :—(*a*) The petition of complaint against servants of the Birauli Factory was sent to the Manager of Birauli Factory for report. The report was submitted by the Manager of Dholi Factory of which Birauli is an outwork; and on that report, which the Magistrate himself describes as 'the report of an interested party', the order to show cause against prosecution under sec. 182 was passed. The Magistrate has therefore not followed a judicial procedure; and although evidence was subsequently taken, it is impossible to say where the effect of the initial illegality ceased, and it must be taken to have vitiated all the subsequent proceedings flowing from it.

"(*b*) There is also the technical objection that the original petition which, although it seeks proceedings under the preventive sections of the Code, is a complaint within the meaning of sec. 4 (*h*) [*Crowdy* v. *Reilly* (1)] has not been finally disposed of, and therefore a prosecution should not be ordered under sec. 162, I. P. C."

Babus Atulya Charan Bose and *Baikuntha Nath Mitra* for the Petitioners.

Mr. Sultan Ahmad for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is a reference made by the Sessions Judge of Darbhanga under sec. 438, Cr. P. C. It appears that on the 8th April 1914, the Petitioners presented a petition to the Sub-Divisional Magistrate of Samastipur, complaining against 9 persons who are servants of the Birauli Factory. In the concluding portion of their petition the Petitioners prayed for proceedings against these 9 persons under secs. 144 and 107, Cr. P. C. The substance of the petition was that these 9 persons had criminally intimidated the Petitioners, assaulted them and attempted to wrongfully confine them. On the filing of this petition, the Sub-Divisional Magistrate passed the following order "To Mr. Wylde of Birauli Factory. Please report on the circumstances of this petition. Put up on 25th April 1914." This order is open to great objection. It was Birauli people who were the accused. Mr. Wylde, the Manager of the Birauli Factory, therefore an interested party, ought not to have been asked to make a report in these judicial proceedings. On the 20th of April a report was received and thereupon the Petitioners were called upon to show cause why they should not be prosecuted under sec. 182, I. P. C. On the 25th of May, four witnesses were examined for the Petitioners and two witnesses for the other side; then on the 26th of May an order under sec. 476, Cr. P. C., was made directing that action should be taken against the Petitioners under sec. 182, I. P. C. We are of opinion that the order, dated the 20th of April 1914, and that, dated the 26th of May 1914, should be set aside. We are further of opinion that sufficient enquiry has not been made into the complaint made by the Petitioners. There should be further enquiry into the truth of the statements made by them in their petition. We may here suggest that a local enquiry is desirable in this case. It may be made by the Sub-Divisional Magistrate himself, or he may depute a Subordinate Magistrate for this purpose. It appears that the Petitioners complain that although some witnesses on their side were examined, they themselves have not been examined. They should be examined if they choose to give evidence. We accept the reference, set aside the orders above referred to, and send back the case for further enquiry.

(1) 17 C. W. N. 554 (1912).

THE

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Contents.

NOTES.

Companies composed of alien enemies trading under State control.

We take the following from the English *Law Journal* which lays down the law as it is in England and the practice as observed in the High Court of England regarding the carrying on of the business of a company formed in England but composed chiefly of alien enemy share-holders. It would seem that, such business may be allowed to be carried on with the reservation that no portion of the profits of the company, and we may add that no portion of its funds or manufacture, should find its way into the enemy country.

"Where the control or management of any firm or company is likely to be so affected by the present state of war as to prejudice the effective continuance of its trade or business, and the Board of Trade is satisfied that it is to the public interest that the trade or business should continue to be carried on, the Court may, on the application of the Board, appoint a 'controller' of the firm or company with such powers as it thinks fit (Trading with the Enemy Act, 1914, sec. 3). The first case under this piece of emergency legislation came before Court of Chancery *In re Meister Lucius and Brunning, Ld.*, and it appeared that the company, which was engaged in the manufacture of synthetic indigo in Lancashire, was registered under the Companies Acts, but that all except twelve shares were held by German subjects resident abroad, and that on the outbreak of the war the Secretary of the Company received instructions from the directors to close the factory. The Board of Trade, however, found that it was to the public interest that the business should continue to be carried on, and applied to the Court on petition to appoint a 'controller' under the Act. Mr. Justice Warrington, after a review of all the circumstances of the particular application, laid down some general rules for procedure in such cases, holding (1) that applications under the Act might be made by originating motion instead of by petition; (2) that the Court would require evidence that the information on which the Board of Trade based its applications had reasonable foundation; (3) that the 'controller' appointed, becoming an officer of the Court, would be ordered to give the usual security demanded from a receiver; (4) that the Court, while not directing the controller to pass the ordinary cash accounts of a receiver and manager, would reserve the power to require him to render and vouch his own accounts in addition to those of the company; and (5) that the controller would make periodical reports upon the company's business and as to the result of carrying it on, and a fresh report on his being discharged from office. The learned Judge was careful to make it clear that the conditions were not the same as they would be in the carrying on of a business of the purpose of a winding up; the controller was merely appointed 'to keep the business as a going concern during the continuance of the present state of war and until the carrying on could be resumed by the company in the ordinary way'. It is abundantly clear from this and other indications that neither the Board of Trade nor the Court will give any countenance to the vulgar ideas of confiscation which are sometimes propagated in un-official circles. Enemy property here will be none the less respected in our Courts because, owing to the state of war, the profits arising from it cannot be allowed to go abroad while the war continues, and any use which may be made of it in the meantime will be regulated strictly by considerations of what is necessary in the public interest."

Pleaders signing Vakalatnamas after presentation.

We have received a communication from the Joint Secretary, District Bar Association, Tipperah, drawing attention to a

letter addressed by the Registrar of the Appellate Side of the High Court to the District Judge of Tipperah, dated the 19th November 1914, a copy of which was sent by the District Judge to the District Bar Association. It appears that the Munsif of one of the Courts in that District disapproved of the practice (which we believe is as old as the profession of pleaders in the Mofussil) according to which a pleader who desires to appear in a case on the strength of a vakalatnama in which his name appears, but which he did not sign at the time it was signed and filed by another pleader, is permitted to sign at a later stage and appear in the proceeding, and insisted on the vakalatnama being signed by any pleader appearing in the case before the vakalatnama should be filed in Court. His brother officers, when referred to, having expressed similar views, the District Bar Association brought the matter before the District Judge, who agreeing with his subordinate Judicial Officers wrote to the High Court recommending the discontinuance of the practice. The High Court, we are glad to find, has not accepted the recommendation. It is difficult to see what valid objection there can be to this practice which is both of long standing and of wide application. On the other hand there is everything to commend it on the ground of convenience. In such circumstances and in the absence of any illegality patent on the face of it, it would have caused great inconvenience to the litigant public to upset the practice.

The letter of the Registrar, which we publish below, makes it perfectly clear that the practice is not opposed to any statutory or other rule of law, even by implication.

"I am directed to acknowledge the receipt of your letter No. 2790 G, dated the 5th November 1914, in which you ask permission to issue a Circular Order ordering the discontinuance of the practice whereby, after a vakalatnama has been accepted and filed by a pleader, some other pleader or pleaders whose names appear therein ask to be allowed to sign the same and to appear in the proceeding.

2. In reply, I am to say that the practice, to which you refer, is believed to be very general, that it is based upon that followed in the High Court, and that the objection to it disappears when it is remembered that the law (Or. III, r. 4, Civil Procedure Code) does not require the acceptance of a vakalatnama to b in writing. In such cases the date of the second acceptance may be added, if thought necessary.

3. In the circumstances, the Judges are unable to accord the permission asked for."

CURRENT INDIAN CASES.
(CRIMINAL.)

Criminal Procedure Code (Act V of 1898), sec. 195—Sanction.

MUHAMMAD FAKHRUDDIN v. BHEKHI RAM, I. L. R. 36 All. 212.

The Petitioner was declared insolvent in the Court of the District Judge and proceedings against him were pending. He presented a written Petition to the District Judge in which he made some allegations against one B. The Petitioner asked the District Judge to take action in various ways, one of these ways being by procuring a Police search at B's premises. This Petition was forwarded by the District Judge to the Magistrate with a request that immediate action might be taken by the Police. The result was B was arrested. Eventually the investigating Police officer reported that there was no sufficient evidence to warrant further proceedings against B who was discharged by the Magistrate. Thereupon on the application of B, the District Judge sanctioned the prosecution of H.

Held—That criminal proceedings were instituted against B within the meaning of sec. 211, I. P. C., but the Court of the District Judge was not the Court in which these proceedings were instituted and it was at least doubtful whether it could be said that this offence of causing to be instituted criminal proceedings without just or lawful ground was committed in relation to a proceeding pending in the Court of the District Judge.

Criminal Procedure Code (Act V of 1898), sec. 133.

JAGARNATH SAHU v. PARMESHWAR NARAIN, I. L. R. 36 All. 209.

The Petitioner was the owner of a field the level of which was below that of the surrounding fields and the result was that the surplus water flowed over this field into a tank to the south of the field. The Petitioner erected a *bund* on the north of this tank and also raised the level of the field to such an extent that the flood water instead of flowing into the tank as it used to do was held back and caused injury to the adjoining fields.

Held—That the Petitioner's field was not such a channel as had been or could lawfully be used by the public. If injury had been caused by any tortious act done by the Petitioner, the persons who had been damnified might have their remedy by civil suits.

Criminal Procedure Code (Act V of 1898), sec. 526.

EMPEROR v. JAGGAN, I. L. R. 36 All. 239.

The law did not intend that a transfer of a case should be ordered simply because an accused person thinks that he would not get an impartial trial, but the real question to be considered is whether on the facts disclosed in the application there arises a reasonable apprehension that the

agistrate who is seised of the case may be prejudiced wittingly or unwittingly against the accused.

Criminal Procedure Code, secs. 112, 167—Remand.

EMPEROR v. RAMESHWAR, I. L. R. 36 All. 262.

Sec. 167, Cr. P. C., does not apply to cases in which action is taken under sec. 112 of the Code.

Criminal Procedure Code, sec. 476.

RE S. SUPPAYA, I. L. R. 37 Mad. 317.

A Magistrate in making an order under sec. 476 omitted to direct the accused to be taken before the nearest Magistrate of the first class. He subsequently made an order directing him to be taken before such Magistrate.

Held—That the omission of the Magistrate was at most an irregularity which was set right by the subsequent order of the Magistrate.

Criminal Procedure Code, sec. 307.

RE A. MUTYALU, I. L. R. 37 Mad. 236.

The accused was placed on his trial on a charge of robbery under sec. 397, I. P. C. The jury unanimously found him not guilty. On a reference by the Sessions Judge under sec. 307, Cr. P. C.,

Held—That the High Court could convict the accused under sec. 326, I. P. C., of which offence the jury could have convicted him

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before N. R. CHATTERJEA and GREAVES, JJ. APPEAL FROM ORDER No. 469 OF 1910 WITH RULE No. 36 OF 1911. NAND KUMAR BARUA, Petitioner, Appellant v. NABIN CHANDRA BARUA AND OTHERS, Opposite Party, Respondents. 26th November, 1914.

Appearance—Civil Procedure Code (Act V of 1908), Or. XLI, r. 19—Dismissal for default.

13th of June 1910, was fixed for the hearing of the appeal in the lower Appellate Court. The Appellant's pleader was ill that day, and did not appear in Court. The Appellant happened to be present in Court and, on the case having been called on, he asked for time to get his pleader. This was disallowed and the appeal was dismissed without hearing. Thereupon, on the 1st of July 1910, the Appellant made an application under Or. 41, r. 19, and that application was dismissed by the learned District Judge, on the ground that the Appellant had appeared in the case and that the application, therefore, could not come within the scope of Or. 41, r. 19.

Held, that the mere presence of the Appellant in the Court-room on the day of hearing and his having asked the Court for time to get his pleader did not constitute appearance of the Appellant within the meaning of the Civil Procedure Code.

Babu Probodh Coomar Das for the Appellant.

Babu Khitish Chunder Sen for the Respondents.

A. T. M. **Appeal allowed.**

CIVIL APPELLATE JURISDICTION. Before D. CHATTERJEE and MULLICK, JJ. APPEAL FROM APPELLATE ORDER No. 173 OF 1912. CORPORATION OF CALCUTTA, Appellant v. SUSHILA SUNDARI DASI, Respondent. Heard, 25th November and 1st December, Judgment, 1st December, 1914.

Decree, execution of—Consent-decree against Hindu widow, directing execution against husband's property in her hands—Death of widow—Execution against reversioner.

Two brothers Rajnarain and Debnarain possessed certain house properties in the town of Calcutta. After Rajnarain's death some taxes due to the Municipality fell in arrear and the Corporation of Calcutta brought a suit in the Presidency Small Cause Court for the recovery of the said taxes from Hemoda Mohini, the widow of Rajnarain, and from Debnarain. A decree by consent was passed in the following terms: "As regards the first Defendant (Hemoda Mohini), to be levied out of the estate of Rajnarain Dutt, deceased, in the hands of the first Defendant, and as against the second Defendant, personally." This decree was transferred for execution to the Court of the First Munsif of Alipore. Hemoda Mohini having died after decree, her daughters Susila and Promila were substituted in her place They seemed to have objected that before any other property in their hands could be laid hold of, the property for the taxes on which the decree had been passed must be attached. This appeared from the judgment of the District Judge, dated the 23rd September 1910, in appeal. The learned Judge held that "the executing Court is bound to execute the decree as an ordinary money-decree: the decree in question may be executed by attachment and sale of any property belonging to the deceased judgment-debtor now in the hands of the Appellant." The decree-holder then attached some immoveable property belonging to the estate of Rajnarain Dutt. The daughter Susila objected that this property was not liable, as she had not inherited this property from the judgment-debtor Hemoda Mohini, but from the father Rajnarain. The learned Munsif held that the objection must fail, as he could not go behind the decree. On appeal the learned Subordinate Judge set aside that order holding that the property attached was not liable, as the objector obtained the same not as the heir of Hemoda, but, as the heir of Rajnarain. Against that order the Corporation appealed to the High Court.

Held, that the decree was to be executed only against any personal property belonging to Hemoda, which had come into the hands of the objector, and not against properties which she had inherited from her father Rajnarain.

Dr. Dwarka Nath Mitter for the Appellant.

Babus Indu Bhusan Brahmachari (for Babu Trailokho Nath Chakrabarty) and Bhupendra Nath Guha for the Respondent.

A. T. M. **Appeal dismissed.**

CIVIL APPELLATE JURISDICTION. Before COXE and RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE No. 245 OF 1911. SHEONANDAN LAL, Defendant No. 2, Appellant v. MOULVI JAINUL ABDIN AND OTHERS (Plaintiffs) and LADDU GOBIND AND OTHERS (Principal and *pro formâ* Defendants), Respondents. Heard, 19th November, Judgment, 25th November 1914.

Vendor's lien, if can be transferred—Transfer of Property Act (IV of 1882), sec. 55, sub-sec. (4), cl. (b).

The suit was for recovery of Rs. 1,000 said to be portion of the unpaid purchase-money of Mauza Dumduma and therefore charged upon that village. This village was sold in 1902 by Ashrof Hossain and Abdul Huq to the Appellant. Out of the purchase-money a sum of Rs. 1,000 was kept by the Appellant on the understanding "that he should pay to one Mahomed Kazim in September 1903, in payment of a mortgage by conditional sale of two villages which may briefly be described as Galib and Katra. Abdul Huq died, and this suit was brought by Ashrof Hossain as one of Abdul Huq's heirs and by the other heirs of Abdul Huq. Ashrof Hossain in 1904 gave the right of redeeming Galib and Katra to his daughter Bibi Azizan, in order that she might obtain those villages by paying the mortgage-money, viz., Rs. 1,000 from her own pocket; and in 1905 he gave to Abdul Huq, his son, his interest in the right of recovering the sum of Rs. 1,000 which was in deposit with the Appellant. The Appellant had not paid the money, although it was two years after the due date. In 1906, Abdul Huq gave the Appellant notice to pay this money, but as he did not do so, the present suit was instituted. After the suit was instituted, the Appellant bought the equity of redemption of Galib and Katra from Azizan alleging that he gave her the sum of Rs. 1,000 to be paid by her to the original mortgagee. This allegation was supported by Azizan. The Court below gave the Plaintiffs a decree.

Held, that the charge mentioned in sec. 55, sub-sec. (4), cl. (b), of the Transfer of Property Act could be transferred to an assignee.

Dr. Dwarka Nath Mitter and Babu Satindra Nath Mukerjee for the Appellant.

Moulvi Muhammad Mustafa Khan for the Respondent.

A. T. M. **Appeal dismissed.**

CIVIL REVISIONAL JURISDICTION. Before D. CHATTERJEE and MULLICK, JJ. CIVIL RULE No. 822 OF 1914 GIRIS CHANDRA MAHENDER, Plaintiff, Petitioner v. PURNA CHANDRA DUTT AND OTHERS, Defendants, Opposite Party. 30th November, 1914.

Provincial Small Cause Courts Act (IX of 1887)—Suit for refund, with interest, of money advanced for marriage pan, if can be instituted in Small Cause Court—Art. 35, cl. (g) of Provincial Small Cause Courts Act, if bar to such suit—Return of plaint by Small Cause Court Judge—Jurisdiction—High Court's interference under sec. 15 of the Charter Act and sec. 115 of the Civil Procedure Code.

Plaintiff instituted a suit in the Small Cause Court at Sealdah, against the Defendant and his brother Baroda Prasad Dutt for the refund of Rs. 200 paid to the Defendant on the 4th Agrahayan 1320 B. S., as advance out of the sum of Rs. [illegible] being the stipulated pan of the marriage arranged between Plaintiff's daughter and Defendant's brother Baroda Prasad Dutt. The marriage was to take place on the 16th of Agrahayan, and the 7th Agrahayan was fixed for the blessing ceremony (Asirbad) of the bridegroom which was performed and the 11th Agrahayan was fixed for the blessing ceremony of the bride. Plaintiff having received information from his eldest brother of the chance of an obstacle to the marriage taking place in the month of Agrahayan owing to a probable childbirth in the family communicated this to the Defendant on the 8th Agrahayan. Thereupon the bridegroom's party did not come to bless the bride on the appointed day, and Defendant's brother was married to some other girl in the course of the month of Agrahayan.

Plaintiff then instituted the above suit for refund of the said sum of Rs. 200 paid to Defendant with a further sum of Rs. 6 as interest thereon.

The learned Small Cause Court Judge held that the suit as framed was one for compensation for the breach of a promise of marriage and that Art. 35 (g) of the Second Schedule of Provincial Small Cause Courts Act was a bar to his taking cognizance of the same, and he, therefore, returned the plaint for presentation to the proper Court. Thereupon Plaintiff moved the High Court under sec. 25 of the Provincial Small Cause Courts Act and obtained the present Rule.

Babu Purnendu Sundar Banerji for the Petitioner contended that the suit was not for any compensation for breach of the marriage, but for refund of the sum advanced and the case reported in 13 C. W. N. 36 (Notes portion) was relied upon.

Babu Jogindra Kumar De for the Opposite Party took a preliminary objection that inasmuch as the Small Cause Court Judge simply returned the plaint for presentation to the proper Court without deciding the case, there had been no error of law, and the High Court could not interfere under sec. 25 of the Provincial Small Cause Courts Act. The case in 13 C. W. N. 403 was cited as authority. It was further contended that inasmuch as the breach of the promise on the part of the Defendant gave rise to the cause of action of the Plaintiff's suit, the case fell under sec. 73 of the Indian Contract Act, and the claim was therefore for compensation for the loss sustained by the Plaintiff in consequence of that breach.

Held, that the suit was for recovery of the sum of money paid to consideration of a contract not given effect to and as such Art. 35 (g) of the Second Schedule of the Provincial Small Cause Courts Act was no bar to the suit being tried by Small Cause Court.

Their Lordships held that they could interfere under sec. 115 of the Civil Procedure Code and sec. 15 of the Charter Act.

H. C. S. **Rule made absolute.**

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 55 OF 1914.

WOODROFFE, J.
COXE, J.
1914,
31, July.

NARENDRA NATH BASU
v.
H. L. STEPHENSON.

Bengal Medical Act (VI, B. C., of 1914), sec. 27—Rules framed under the Act by Local Government, if ultra vires—Specific Relief Act (I of 1877), sec. 45—Mandamus—Omission of qualified candidate's name from Election Roll—Mistake of Returning Officer—Jurisdiction of High Court to interfere.

The Petitioner was a Licentiate in Medicine and Surgery of the University of Calcutta and as such was admittedly entitled to be registered under sec. 4 of the Bengal Medical Act. The Petitioner's name was omitted from the preliminary list of persons qualified to vote at the first elections under the Act published by the Returning Officer appointed by the Local Government. His name was also omitted from the final Election Roll. The Petitioner's application to the Returning Officer to have his name entered was not considered by that officer. The Petitioner applied to the High Court under sec. 45 of the Specific Relief Act for an order compelling the Returning Officer to include and publish his name in the final Election Roll.

Held—*That the High Court had no jurisdiction to interfere.*

Under rule 16 of the rules framed by the Local Government under the Bengal Medical Act, the decision of the Local Government on any question that may arise as to the intention, construction or application of the rules shall be final, and under sec. 27 of the Act no suit or other legal proceedings shall lie in respect of any act done in the exercise of any power conferred by the Act on the Local Government or the Council or the Registrar.

The Act which is referred to in sec. 27 is not one done by the Local Government, but done in exercise of any power conferred by the Act on the Local Government.

Per CHAUDHURI, J.—*It is quite clear that under sec. 33 of the Bengal Medical Act the Local Government has power to make rules for the purpose of carrying out the Act and the rules framed and published were not* ultra vires.

Per WOODROFFE AND COXE, JJ.—*Even assuming that the rules were* ultra vires, *the application must fail; for it was based on the assumption that the rules were not* ultra vires *but that they were valid rules which had not been given effect to in one particular by the Returning Officer.*

This is an application under sec. 45 of the Specific Relief Act to compel the Hon'ble Mr. H. L. Stephenson, Financial Secretary to the Government of Bengal, who was appointed by the Government to be the Returning Officer under the Bengal Medical Act in respect of the first elections to the Council of Medical Registration, to include and publish the name of the Applicant Dr. Narendra Nath Basu in the final Election Roll, so as to enable him to take part in that election.

The facts are shortly as follows :—Dr. Basu is a Licentiate in Medicine and Surgery of the Calcutta University, having obtained his degree in 1896, and he is a medical practitioner practising in Calcutta. Under the rules published by the Local Government under sec. 33 of the Bengal Medical Act, a preliminary list of persons appearing to be qualified to vote at the first elections was published by the said Returning Officer in the Calcutta Gazette of the 10th June 1914. Dr. Basu's name was not included in that preliminary list. Under the rules all objections to and applications for inclusion of names in the said list were to be sent to the office of the said Returning Officer before the 4th of July 1914. Dr. Basu sent an application for inclusion of his

name on the 2nd of July 1914. His application was not considered by the Returning Officer at all. It was admitted by the counsel for the Returning Officer that such failure to consider the application was due to an oversight. On the 15th of July 1914, a list purporting to be the final Election Roll was published in the Calcutta Gazette and the name of Dr. Basu was again omitted from the final list. On the 17th of July 1914, Dr. Basu again applied to the Returning Officer for inclusion of his name. In reply to such application the Returning Officer on the 21st of July 1914 wrote saying that, since the name of Dr. Basu was not included in the final Election Roll, it was not possible under the rules to enter his name in the list of voters. Upon such refusal this application was made to the High Court.

The case came on for hearing in the first instance before Chaudhuri, J.

Mr. H. D. Bose (with *Mr. B. L. Mitter* and *Mr. Sarvadhikary*) for the Applicant.

Mr. Bose argued that it was a proper case under sec. 45 of the Specific Relief Act, and nothing in the Bengal Medical Act had taken away or interfered with the jurisdiction of the High Court. Sec. 27 of the Bengal Medical Act had no application, as the Returning Officer under the rules was independent of the Local Government or the Council or the Registrar under the Act. He was a public officer whom the Court could compel to perform his duty. Rule 4, which provided that on publication the final Election Roll should be "deemed to be final and conclusive", meant that it should be conclusive for the purpose of the election and any election held on the basis of the said final Election Roll as published could not be challenged on the ground of the Election Roll being incorrect. He further submitted that rule 3 provided that the Returning Officer "shall" consider all objections and applications in respect of the preliminary Election Roll and prepare therefrom a final Election Roll. In the present case, the Returning Officer having admittedly failed to consider Dr. Basu's application, the Election Roll published on the 15th of July was not the final Election Roll, within the meaning of rules 3 and 4, and, therefore, there was no finality or conclusiveness in the Election Roll published on the 15th of July 1914, although it was called the final Election Roll. The Court had power to compel the Returning Officer, as the Returning Officer had himself the power of his own motion to correct the admittedly incorrect Election Roll.

Mr. B. C. Mitter, Standing Counsel, appeared for the Returning Officer and said that the name of Dr. Basu had been omitted by mistake. He argued that the Court had no jurisdiction to make any order as it was clearly the scheme of the Act to oust the jurisdiction of the Court. The right of franchise was given by the Act and unless a remedy was also given by the Act, there was none for the violation of that right. Sec. 27 of the Act expressly excluded the jurisdiction of the Court. He further argued that under rule 4, the final Election Roll upon publication became final and conclusive for all purposes and there was no power either in the Court or in the Returning Officer to correct that Election Roll.

The following judgment was delivered by

CHAUDHURI, J.—I regret, I have to refuse this application. It is conceded that the Applicant is qualified as a Licentiate in Medicine and Surgery of the University of Calcutta. It is also conceded that in the preliminary list made by the Returning Officer his name was not entered; that he protested against it and sent in

NARENDRA NATH BASU *v.* MR. H. L. STEPHENSON.

an application for the inclusion of his name; and that the Returning Officer has failed to consider his application. His contention was that he was entitled to be registered under sec. 4, cl. (*d*) or cl. (*e*). The Returning Officer apparently did not think that he was qualified under cl. (*d*) and overlooked the contention about cl. (*e*). The Returning Officer then prepared the final Election Roll. It is also conceded that if the matter of the Applicant's contention based upon cl. (*e*) had been present before the Returning Officer's mind, the omission would not have occurred. The final Election Roll was then published in the Calcutta Gazette as provided for in the Rules. It is clear that this application satisfies all the requirements of sec. 45 of the Specific Relief Act, cls. (*a*) to (*d*), namely, that the Applicant is entitled to exercise his franchise, and that his right to exercise it would be injured, that it was clearly incumbent on the Returning Officer to consider his application, that he has failed to do so in his public character, and that it was right and just on his part to consider the application and include the Applicant's name, and that the Applicant has not other specific legal remedy. But the question arises as to how far the election rules applicable to this matter oust my jurisdiction, and whether the Court can exercise its power in favour of the application. It is quite clear that under sec. 33 of the Bengal Medical Act, the Local Government has power to make rules for the purpose of carrying out the Act. Rules have been framed with that object. The rules I have referred to, about the preparation and publication of the Election Roll, can in no sense be said to fail to carry out the purposes of the Act. It is the failure of the Returning Officer to comply with the rules which has created the difficulty. The rule says he shall consider the application and prepare the Election Roll and publish it. I was at one time under the impression that the duty of the Returning Officer was to consider the applications, and to prepare the final Election Roll and to send it to the Local Government for publication and that the Local Government eventually published the Election Roll. But the rule is clear, that the Returning Officer is the person who has to publish the Election Roll in the Calcutta Gazette in manner directed by the Local Government. The rule, however, lays down that on such publication, the Election Roll as published is to be deemed as final and conclusive. I do not see that this rule is at all *ultra vires*. It appears also, looking at sec. 27 of the Act, that it was not intended that the Law Courts were to interfere in these matters. The Election Roll on publication becomes final and conclusive. It gets its finality as soon as it is published. It does not seem open to any process of revision. If the Returning Officer considered the application and wrongly decided the matter, or even arbitrarily did so, the publication of the Election Roll made it final. I do not think it could be then revised by the Court. If an arbitrary adverse decision may not be revised, it seems hardly open to revision, for failure of consideration. The Court could perhaps compel the Returning Officer to consider the application before the publication of the Election Roll, but I fear it is now too late. Having regard to the facts, I regret I am unable to help the Applicant, as I should like to, in a matter of this character. In view, however, of the default on the part of the Returning Officer in considering the application, I shall make no order against the Applicant for the costs of this application.

[The Petitioner preferred an appeal

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which came on for hearing before WOODROFFE and COXE, JJ.]

Mr. Norton (with him *Messrs. Chakravarti* and *H. D. Bose* for the Appellant) referred to the provisions of the Act. Sec. 32 provides the machinery, but the rules in question in this case are made under sub-sec. 2, cl. (*a*), which refers to the election after the Medical Council has come into existence. These rules which have been impleaded against me and which were published in the Calcutta Gazette of the 3rd June 1914 cannot have anything to do with my right to have my name entered in the list of persons qualified to be registered under the Act.

The proviso to sec. 6 deals with the first election. It speaks of persons qualified under the Act and the qualifications are set out in the schedule. I am duly qualified and entitled to claim registration in the preliminary list. The effect of the construction which the lower Court has put on the rules (which say that the list when published shall be final) would be that the Local Government in framing rules will be entitled to abrogate the undoubted qualification which under the Act I have

Under sec. 33 (1), the Local Government is empowered to frame rules regulating the qualification of persons to form the Electoral College for the Bengal Medical Council. This the Government has not done. They have issued rules under the section which deals with the Council after it has come into existence. The proviso to sec. 6 with the schedule makes it quite clear (and it is admitted) that I am qualified.

The rules pleaded in extenuation of their conduct do not apply. That is my first contention.

Secondly, even assuming that the rules are valid, I can ask your Lordships to correct what is evidently a mistake.

[WOODROFFE, J.—Where the rules published are final?]

It is in the rules.

The rules say that the Returning Officer shall consider objections, etc. It is imperative that the Returning Officer will consider objections.

[WOODROFFE, J.—Rule 4 is subject to 3. They are conclusive as regards all matters which have been considered.]

Yes.

The rules framed under the Act throw on the Returning Officer an obligation to consider all objections and where that course has not been followed, the rules cannot be final.

Mr. B. C. Mitter for the Respondent.—I may mention to your Lordships that this point that the rules have not been properly framed was never alluded to in the Court of first instance. This is the first time that I hear this objection.

Mr. Norton.—I have given notice of this ground. My second ground is strong enough. There has admittedly been a mistake. My client is undoubtedly qualified under the Act, and I can ask your Lordships to correct it.

[WOODROFFE, J.—Is it admitted that the Returning Officer omitted to consider the objection?]

Mr. Mitter.—It is admitted that so far as regards his qualification as an L.M.S. of the Calcutta University [cl. (*c*), sec. 4], there was a mistake; but as regards his qualification under cl. (*d*), sec. 4, it was duly considered and the Returning Officer held against him.

Mr. Norton.—I am entitled to come here for a mandamus.

Refers to sec. 27 of the Medical Act which bars proceedings in Court. If the section applies to my case, I am outside it because it is a case of omission.

Secondly, it is not an act done by the

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Local Government, but an officer created by the Local Government for carrying out certain preliminary purposes. There are sections in the Act where acts contemplated e done by the Local Government are to und.

Secs. 26 and 27 refer to statutory prohibition with regard to the acts of Government other than the preparation of the preliminary list. These sections are not intended to apply to anything anterior to the creation of the Council. Even taking the worst view, the omission complained of is not an omission of the Local Government but of the Returning Officer.

To sum up,

If the Act gives the right, no rule framed under the Act can take it away.

The mere publication of a list without considering the objections cannot make the list final. Suppose by a mistake of the printers pages of the list are omitted; is it to be said that there is no remedy and the imperfect list is final?

Refers to sec. 45 of Specific Relief Act.

[WOODROFFE, J.—The Medical Act is a Bengal Act, and can it interfere with the right of mandamus? I believe, there have been cases.]

Our case is that no Bengal Act can take away a right given by an Imperial Act. Cites *Hari Pandurang* v. *Secretary of State for India* (1).

[WOODROFFE, J. (to Mr. Mitter).—Your contention is that the right of mandamus has been taken away.]

Mr. Mitter.—The whole jurisdiction of the Courts has been taken away. There is the Act of Parliament which authorises the Local Government to repeal or amend any Act passed by the Government of India (53 and 56 Vict., Chap. 14, sec. 5).

[WOODROFFE, J.—Then the point would be that if this mandamus rested on any power of the High Court derived from the Charter, it could not be interfered with, but this power being derived from the Specific Relief Act passed by the Government of India it can be taken away.]

Mr. Mitter.—Yes. That is the point. The whole Specific Relief Act can be repealed by the Local Government under the authority of the Parliamentary Statute. Referred to *Queen* v. *Burah* (2). This point was feebly suggested by my friend in the Court below and at once withdrawn.

Mr. Norton.—The inherent jurisdiction of the High Court cannot be taken away by any legislature in India. The relief given by the *habeas corpus* still exists in spite of the Code of Criminal Procedure. So the relief given by a writ or mandamus still exists.

Refers to sec. 27.

What is the power conferred on the Local Government? It is the power conferred by sec. 33 to frame rules. That right they had. Some person other than the Local Government proceeds to do an act. That is not an act of the Local Government which is protected by the section.

[WOODROFFE, J.—Assuming for the sake of argument that Mr. Norton was right in his contention and could show that these rules are *ultra vires*, would you still contend that sec. 27 stands in his way?]

Mr. Mitter.—I will deal with this point.

Mr. Norton.—Your Lordships have power to ascertain whether an act done was done in pursuance of the powers conferred by the Act. If your Lordships find that it is not so, then you have power to interfere.

Under the Act the Returning Officer has no discretion. If a man has got the

(1) I. L. R. 27 Bom. 424 at p. 445 (1903).

(2) I. L. R. 4 Cal. 172 (1878).

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qualification required by the statute, he is bound to return him.

For the meaning of final and conclusive, see *Board of Education* v. *Rice* (3). Discretion must be exercised genuinely: *Williams* v. *Giddy* (4), *Stiles* v. *Galinski* (5).

It has been said that the question whether I was qualified under the English Medical Act (1886) was considered and decided against me. Your Lordships will see that decision was arrived at arbitrarily. I was not heard, no explanation was taken from me. I was entitled to be heard. Refers to the English Act.

Mr. Mitter.—This point was not pressed in the Court of first instance. I do not mind if your Lordships decide the point, but it is inconvenient if points not pressed in the first Court are taken and pressed in the Appeal Court.

The objection is that the rules are bad, because published under sub-sec. (2), sec. 33, and cannot have any application to the first election under the Act.

[WOODROFFE, J.—The application is on the assumption that the rules are good.]

Yes. In that case he must submit to his application being dismissed and then apply for an injunction restraining any election.

In a writ of mandamus the duty must be clearly incumbent on the public officer.

The question of the validity or otherwise of the rules is hardly a matter within sec. 45 of the Specific Relief Act.

The present rules are copied from the rules framed by the Government of India to regulate elections to the Supreme Legislative Council, so your Lordships' decision, if you so decide, that these rules are *ultra vires* would in one sense affect the Government of India rules. Your Lordships will not go into that, for in that case the Government ought to have notice and for the matter of that the Government of India should also be before you.

The whole scheme of the Act is that the jurisdiction of the Courts is ousted.

Secs. 17, 23, 24, 25, 26 and 27.—These are the sections it will be necessary for me to refer to.

Under the Act the Courts have no jurisdiction. Secondly, under the rules, if they are valid rules, the Court have no jurisdiction in respect of anything done under the rules.

If rule 16 is a valid rule, the argument on the other side at once falls to the ground.

[*Mr. Chakravarti.*—Assuming that the rules are valid, rules 15 and 16 do not apply to the proviso to sec. 6 or to rules 3 and 4, but they apply specifically to rule 6, cl. (2), rule 10, cl. (4).]

There is no limitation as to the application of the rules.

The Returning Officer had no power to correct the mistake. The only course left to them was to go to the Local Government.

[WOODROFFE, J.—Could they go to the Local Government? Under what section?]

Under sec. 16 of the rules.

So far as the Returning Officer is concerned, sec. 4 is conclusive. The words "deemed to be final and conclusive" are stronger than "final and conclusive." Whether final and conclusive or not, they shall be by a fiction deemed to be final and conclusive. Cites *Re Hadleigh Castle Gold Mines Ld.* (6).

Mr. Chakravarti in reply.—My friend assumes that we have been proceeding on the validity of the rules. That is not so.

(3) [1911] A. C. 179.
(4) 15 C. W. N. 669 (1911).
(5) [1904] 1 K. B. 615 at p. 621.
(6) [1900] 2 Ch. 419.

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My application is—put me on the list under the proviso to sec. 6.

The rules have been set up in defence by the other side.

Sec. 27 can only apply after the Council has come into existence and a Registrar has been appointed.

I do not rely on the rules, but even regard being had to rules 15 and 16, it appears that they were necessary because sec. 27 did not apply.

As regards appealing to the Local Government, where is the provision within the four corners of the Act of appealing to the Local Government in case there has been a violation of the proviso to sec. 6?

The Local Government has power to appoint any one to make up a list under the proviso to sec. 6 and if my name is omitted therefrom I can come to your Lordships and pray for relief.

The JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—It has been pointed out to us on behalf of the Appellant that the rules were published under sec. 33 (2) (*a*), and it has been argued that clause (*a*) refers to the election after the Medical Council has come to existence and not to the election for the purpose of bringing the Council into existence. Therefore it has been argued that the rules were "*ultra vires*," although it is conceded that they would have been valid, had the notification purported to proceed under the first clause of sec. 33. This argument was not raised in the first Court. But if we assume without deciding that the rules were *ultra vires* as is contended, then the application must fail; for it is clearly based on the assumption that the rules were not *ultra vires*, but that they were valid rules which had not been given effect to in one particular by the Returning Officer; for, what the application asked for is an order on the Returning Officer to publish, by notification in the Calcutta Gazette as a part of the Election Roll published in the Calcutta Gazette on the 15th July 1914, the name of the Applicant as a person qualified to vote and to do all acts and things necessary in that behalf. Whereas if there were no valid rules under which the election took place, the remedy would not be mandamus, but if there were a remedy at all, it would be in the nature of an injunction staying proceedings which were challenged on the ground of their invalidity. It is quite obvious to me that when this notice of the Applicant was issued on the 24th July 1914, it was not intended to dispute the validity of these rules, but to proceed upon the assumption that valid rules had not been given effect to. I need not further consider this matter, because it was not argued in the Court of first instance, and the Local Government who would be affected by any decision as to the validity of the rules which they have published are not before the Court. This argument, in my opinion, fails. I do not wish to express any opinion upon the argument itself as to whether the rules are or are not *ultra vires*, for it is not necessary to do so. I may note, however, that it is pointed out on behalf of the Respondent that these rules in the Bengal Medical Act are in the same terms which govern the election in the Council of the Government of India. Assuming then that the rules are valid, the question is whether the Applicant has made out a case. Now under rule 16, the decision of the Local Government on any question that may arise as to the intention, construction or application of these rules shall be final, and under sec. 27 of the Act, no suit or other legal proceedings shall lie in respect of any Act done in the

exercise of any power conferred by the Act on the Local Government, or the Council or the Registrar. The act which is there referred to is not one done by the Local Government, but done in exercise of any power conferred by this Act on the Local Government. Moreover, what is referred to in the notice is not an omission, even if there is any force in the contention which distinguishes between the words "act" and "omission." It has been conceded on behalf of the Applicant that the object of the Act was to oust the jurisdiction of the Court. But it has been submitted to us that this was the intention of the Act when and after the Bengal Medical Council was constituted and that the Courts were to exercise jurisdiction up to that point. I cannot myself believe that this was the intention. I need not dwell upon this part of the case, because I agree with Mr. Justice Chaudhuri who would have been, as he says, willing to have acceded to the application, if he thought that he could under the law possibly do so. I agree with him that it is not open for us to interfere. On the facts, it has been conceded that the case is a hard one, because there is no doubt that the Applicant is a person who is qualified to be registered under the Act. It is admitted that he is a Licentiate in Medicine and Surgery of the University of Calcutta. The fact that he was a Licentiate in Medicine and Surgery of the University of Calcutta was not considered with the result that his name was excluded from the list. As Mr. Justice Chaudhuri has pointed out, it was owing to inadvertence the name of the Applicant has been omitted from the list. I think, however, that there is much force in the contention that after the list had been published under rule 4, it was final and conclusive, and the Returning Officer was *functus officio*.

Mr. Mitter, who appeared on behalf of the Respondent, pointed out to us that under rule 16, the Local Government has power to decide questions arising as to the intention, construction or application of these rules, and certainly it is a question of construction of these rules as to whether or not there can be said to be a final and conclusive publication under rule (4), so far as the Applicant is concerned, seeing that there has been no consideration of his case, as I have already described, under cl. (3). For it may be reasonably contended that cl. (4) is to be read as subject to cl. (3), if effect is to be given to both provisions. The only remedy which appears to me to be open to the Applicant is to represent his case to the Local Government. So far as we are concerned, we have no jurisdiction to interfere. The result is that this appeal must be dismissed. No costs are asked for.

COXE, J.—I agree.

Messrs. Leslie and *Hinds*, Solicitors for the Applicant.

Mr. C. H. Kesteven, Government Solicitor, for the Respondent.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1213 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
4, June.

PANCHKARI CHATTERJEE, Defendant, Appellant,
v.
MAHARAJ BAHADUR SING, Plaintiff, Respondent.

Non-transferable holding—Transfer—Ejectment by landlord—Limitation Act (IX of 1908), sec. 18.

A landlord suing in ejectment a purchaser of a non-transferable holding cannot succeed unless he makes out a case under sec. 18 of the Indian Limitation Act, where the purchase took place more than 12 years before the suit.

PANCHKARI CHATTERJEE v. MAHARAJ BAHADUR SING.

PROBHABATI DASSI v. TIABATUNNESSA (1), *followed*.

This was an appeal from a decision of E. Panton, Esq., District Judge, Berhampore, dated 10th April 1912, reversing that of Babu Debendra Bijoy Bose, Subordinate Judge, Murshidabad, dated 28th April 1911.

The Plaintiff alleged that he was the owner in possession, in *putni* and *dar-putni* rights, of Mahal Taraf Bania; that within the aforesaid Taraf Bania, in Mauza Debagram, Plaintiff's tenant one Poresh, an inhabitant of Debagram, held possession of 95 bighas odd land at an annual rental of Rs. 64-2-5; that the *jote*-right which Poresh held in these lands was not transferable without the consent of the landlord: that Plaintiff who was a resident of another village at a great distance came to know on enquiry, in 1315, that the Defendant was enjoying possession of the lands without right in collusion with the Plaintiff's Mofussil agents; that the original tenant Poresh Kotal, or his heir, was not in possession of the said land and had abandoned the holding; and that Plaintiff therefore instituted this suit for khas possession of the lands held by Poresh.

The defence so far as is material for the purpose of this report was—(*a*) that Poresh Kotal transferred the lands in suit by a *kobala*, dated 16th Pous 1301, corresponding to 30th December 1894, with the knowledge of zamindar's agent, and since then Defendant was in possession; (*b*) that the suit was barred by limitation. The Court of first instance dismissed the suit as barred by limitation; the Plaintiff appealed, and the lower Appellate Court reversed the decision of the first Court and gave the Plaintiff a decree for ejectment.

Hence this appeal by the Defendants.

Dr. Rash Behary Ghosh (with *Babus Bipin Behary Ghosh* and *Bankim Chandra Mukerjee*) for the Appellant relied on *Prabhabati* v. *Tiabatunnessa* (1).

Babus Mohendra Nath Roy and *Sarat Koomar Mitter* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Defendant in a suit for ejectment. The case for the Plaintiff is that the disputed holding was non-transferable and was held by one Poresh Kotal as tenant. The latter transferred the holding to the Defendants on the 30th December 1894. From that date, the Defendant came into occupation and has ever since paid rent to the officers of the landlord, who have granted him receipts in which he is described as *guzratdar*. On the 14th April 1910, the Plaintiff instituted this suit to eject the Defendant on the allegation that it was only in 1908 that he became aware of the purchase by the Defendant. The Court of first instance held that the suit was clearly barred by limitation inasmuch as the Defendant had been in occupation for more than 12 years, and that it was immaterial that the Plaintiff became aware of the transfer in his favour by the original tenant quite recently. On appeal the District Judge has reversed that decision. He has held that the claim is not barred by limitation as the Defendant is not shown to have been in occupation as transferee to the knowledge of the Plaintiff for more than 12 years before suit. In our opinion this view cannot possibly be maintained.

It was pointed out by this Court in the case of *Probhabati Dassi* v. *Tiabatunnessa Choudhurani* (1), that a Plaintiff suing in ejectment a purchaser of a non-transfer-

(1) 17 C. W. N. 1088 (1913).

(1) 17 C. W. N. 1088 (1913).

able occupancy holding cannot succeed, unless he makes out a case under sec. 18 of the Indian Limitation Act, where his right to possession accrued long before 12 years of the commencement of the suit. Here the Defendant has been openly in possession of the land ever since his purchase. It has not been suggested that circumstances exist such as would attract the operation of sec. 18 of the Limitation Act. The Plaintiff has consequently to make his choice of one of two possible alternatives; either the Defendant has held as tenant or has been in adverse possession as trespasser for a longer time than the statutory period; in either view, he is protected from ejectment.

The result is that this appeal is allowed, and the decree of the District Judge set aside. The Defendant has expressed his readiness to acknowledge the Plaintiff as his landlord and to pay him rent. We accordingly dismiss the claim for ejectment, but give the Plaintiff a declaration that the Defendant holds as his tenant. The Plaintiff must pay the Defendant his costs in all the Courts.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1084 OF 1912.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1914,
Heard, 20 and 21, May.
Judgment, 21, May.

A. H. FORBES, Plaintiff, Appellant,
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Defendant, Respondent.

Income Tax Act (II of 1886)—Executor if liable to pay income-tax for income of estate—Suit for declaration that such income is not liable to be taxed, if lies—Indian Contract Act (IX of 1872), sec. 72—Payment under coercion—Jurisdiction of Collector to determine who is chargeable with tax.

The executor to an estate brought a suit against the Secretary of State for India in Council for a declaration that as executor he was not liable to pay any income-tax in respect of any income of the estate and that the Collector in realising the sums paid to him acted without jurisdiction.

Held—*That to succeed in this suit it was incumbent on the Plaintiff to show that the payment had been made by him under coercion; and assuming that there was coercion within the meaning of sec. 72 of the Contract Act the suit did not lie.*

That income accruing to an executor under the will of a testator is liable to be taxed within the meaning of the Income Tax Act. Apart from the exemption provided in the Act in favour of persons whose income does not reach a certain amount, there is no personal exemption of which an executor as such could take advance.

That in determining that the Plaintiff was a person chargeable with income-tax the Collector acted within the limit of his jurisdiction.

This was an appeal preferred on the 9th May 1912 against a decree of T. C. Mukerjee, Esq., District Judge of Zilla Purnea, dated the 26th February 1912, confirming a decree of Babu Sashi Bhusan Banerjee, Munsif of Sadar Purnea, dated 14th July 1911.

The facts of the case material to this report will appear from the judgment.

Babus Mohendra Nath Ray and *Jogendra Chandra Mukerjee* for the Appellant.

Mr. S. P. Sinha and *Babu Ram Charan Mittra* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This is a suit brought by Mr. A. H. Forbes who is described as

executor to the estate of the late A. J. Forbes, against the Secretary of State for India in Council, and the prayer of the plaint is for a declaration that, as executor to the estate of the late A. J. Forbes, the Plaintiff is not liable to pay income-tax in respect of any income of the said estate and that the said Collector in realising the sums paid to him acted without jurisdiction, and for a decree for the sum of Rs. 912-3-3, being the amount realised, with interest.

To succeed in this suit it was incumbent on the Plaintiff to show that the payment had been made by him under coercion. It is unfortunate that there was no direct issue on that point, nor has our attention been drawn to any finding of fact as to this; but it may be assumed for the purposes of this case that there was coercion within the meaning of sec. 72 of the Contract Act as interpreted by the Privy Council in *Kanhaya Lal* v. *National Bank of India, Ld.* (1).

What then is the ground on which this declaration is sought? This has not been made clear to us in the course of the argument.

The case turns upon the Income Tax Act (II of 1886), which is described as "an Act for imposing a tax on income derived from sources other than agriculture." The preamble is in these terms: "Whereas it is expedient to impose a tax on income derived from sources other than agriculture; it is hereby enacted as follows". Then there is a definition of income as being income and profits accruing and arising or received in British India, and includes, in the case of a British subject within the dominions of a Prince or State in India in alliance with Her Majesty, any salary, annuity, pension or gratuity payable to that subject by the Government or by a local authority established in the exercise of the powers of the Governor-General in Council in that behalf. Chapter II of the Act deals with the liability to tax, and it commences with sec. 4 which provides that "subject to the exceptions mentioned in the next following section, these shall be paid, in the year beginning with the first day of April 1886, and in each subsequent year, to the credit of the Government of India, or as the Governor-General in Council directs, in respect of the sources of income specified in the first column of the second schedule to this Act, a tax at the rate specified in that behalf in the second column of that schedule." Sec. 5 provides for certain exceptions, and enacts that nothing in sec. 4 shall render liable to the tax the several sources of income there indicated. It is not suggested that the income with which we are now concerned comes within any one of those exceptions. But the argument would appear to be that though that which has been taxed is "income", still because the recipient is an executor no tax is payable. There is no provision in the Act which authorizes such a view. There is an exemption provided in favour of those whose income does not reach a certain amount; but apart from that there is no personal exemption of which an executor as such could take advantage. Chapter II merely deals with the liability of the subject-matter to tax. Chapter III deals with assessment and collection, the natural sequel to the general liability imposed by Chapter II. It deals with income under four heads which correspond with the four sources of income set forth in the second schedule to the Act. The first source of income is salaries and pensions; second, profits of companies; third, interest on securities, and, fourth

(1) L. R. 40 I. A. 56: s. c. 17 C. W. N. 541 (1913).

and last, other sources of income. For the purpose of the argument before us it has been assumed that the income with which we have to deal comes under the last of these four heads. While it is provided with regard to the first three classes of income that the tax shall be deducted or be paid as expressly indicated, the wider class of incomes coming under clause (d) was not capable of such simple treatment; and so we find it is provided by sec. 14 that "the Collector shall, from time to time, determine what persons are chargeable under Part IV, and the amount at which every person so chargeable shall be assessed." Apart from that, there is no indication within or without the Act of the person who is chargeable in respect of other sources of income, and it will be noticed that it is the Collector who shall determine what persons are chargeable in respect of these other sources of income. It may be that there is a limitation placed upon the Collector's decision by the words of sec. 15 which clearly indicate—as common sense indeed would determine—that the person chargeable is the person to whom the income accrues. All that appears very simple and in this case it has been observed by the Collector, who has come to the conclusion that the subject-matter with which he was dealing was income—as admittedly it was—and so was subject to tax. He further determined that the Plaintiff, being the person to whom the income accrued, was the person chargeable under Part IV. In so determining he was exercising a jurisdiction that was clearly vested in him by the Act, and I cannot see how it can be said that he purported to exercise a jurisdiction which he did not possess, and so did not make an assessment under the Act.

It has been argued before us that secs. 20 to 23 throw a flood of light on the case favourable to the Plaintiff. I fail to see it. They deal with a special class of cases, and principally of persons who by incapacity arising from some personal defect or non-residence are unable to be approached and dealt with directly, and the sections provide that trustees, guardians, committees, agents and so forth may be dealt with in their places. They further make a special provision for Receivers or Managers in whom no property vests and also the Court of Wards, Administrators-General and Official Trustees. But if it be argued from this that it affords an indication that income accruing to an executor under the will of a testator is not liable to be taxed, I am of opinion that the argument has no value and no force. I have indicated my views to the effect that this is income which is liable to be taxed within the meaning of the Act. I have also shown that the Collector has determined that the Plaintiff is a person chargeable and that in so doing he acted within the limit of his jurisdiction. That being so, it appears to be a case where, according to sec. 39, it is right to say that the suit does not lie. It has therefore been rightly dismissed by the lower Court and we dismiss the appeal with costs.

N. R. CHATTERJEA, J.—I agree.

Appeal dismissed.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE No. 1846 OF 1909.

N. R. CHATTERJEA, J. 1911, Heard, 12, July. Judgment, 24, July.

GOPINI DEBI and anr., Plaintiffs, Appellants,

v.

RAM TARAN TEWARY and ors., Defendants, Respondents.

Landlord and tenant—Suit by former to eject latter from land alleged to be khas—Onus, if on landlord or on tenant to prove tenancy.

GOPINI DEBI v. RAM TARAN TEWARY.

The mere fact that the Defendant holds some land under the Plaintiff as tenant would not be sufficient to throw upon the Plaintiff the burden of showing that in respect of any other land in the zamindari which the Defendant may be found to be in possession of, he has no right as tenant. The burden of proof in a case like this is on the tenant.

The principle laid down in RHIDOY KRISTA MISTRI'S *case* (2) *throwing the onus on the Plaintiff should be held applicable to cases where the land sought to be recovered is admitted by the Plaintiff to be contiguous to the holding of the Defendant, or that it has come to his possession by encroachment.*

This was an appeal preferred on the 30th August 1909, against a decree of Babu Bankim Chandra Mitra, Subordinate Judge of Zilla Burdwan, dated 21st July 1909, reversing a decree of Babu Parada Kinkar Mukerjee, Munsif of Asansol, dated 14th July 1908.

The material facts of the case will appear from the judgment.

Babus Surendra Nath Ghosal and *Probodh Chandra Mukerjee* for the Appellants.

Babus Jogendra Nath Mookerjee and *Upendra Nath Chatterjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiffs-Respondents as *putnidars* of Mauza Harishadihi sued to recover possession of six plots of land alleging that the said lands were the *khas* lands appertaining to 8½ annas share of the *putni*. The defence of the Defendant No. 3 was that plots Nos. 1 to 4 and 6 appertained to her *jotes* and the defence of the Defendant No. 4 was that plot No. 5 was held by him under one Gour Roy who had not been made a party to the suit and plot No. 6 as a sub-tenant under the Defendant No. 3.

Both the Courts below found that the Plaintiffs had failed to prove that the lands were *khas* lands. The Court of first instance dismissed the suit, but the lower Appellate Court held that Plaintiffs being admittedly the *putnidars* are entitled to *khas* possession, as the Defendants had failed to prove any tenancy right in the lands and accordingly decreed the suit.

The Defendants Nos. 3 and 4 appealed to this Court. The Defendant No. 4 has however settled the dispute with the Plaintiffs and filed a petition for withdrawing the appeal. The appeal so far as he is concerned is therefore dismissed without costs as the Plaintiffs have agreed to give up costs. The result of this compromise is that it is unnecessary to deal with any question with respect to plot No. 5 or with respect to the tenancy right claimed by the Defendant No. 4 in plot No. 6 under the Defendant No. 3.

It is contended on behalf of the Defendant No. 3, first, that the Plaintiff's case that the lands were the *khas* lands of the 8½ annas share of the *putni* having been found to be false the suit ought to have been dismissed ; second, that the onus ought to have been placed upon the Plaintiff to prove that the lands were outside the Defendants' *jotes*, and, lastly, that the Defendants ought to have been given an opportunity of meeting the new case upon which the lower Appellate Court gave a decree for *khas* possession to the Plaintiff.

As regards the first contention, it is true that the Plaintiffs' case that the lands are *khas* lands appertaining to the 8½ annas share of the *putni* has been found to be false, but that is not sufficient for dis-

(2) 12 C. L. R. 457 (1883).

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missal of the Plaintiffs' suit. The Plaintiffs' title as *putnidars* of the mauza being admitted, the Defendant cannot resist Plaintiffs' claim for *khas* possession unless she can show that she has a tenancy which will entitle her to retain possession of the lands. See *Narsingh Narain Singh* v. *Dharam Thakur* (1). The first contention therefore fails.

The second contention raises the question of onus of proof. It was urged that as the Defendants hold two *jotes* in the mauza the onus is upon the Plaintiffs to prove that the lands in suit are outside those *jotes*, and in support of this contention reliance was placed upon the cases of *Rhidoy Krista Mistri* v. *Nabin Chandra Sen* (2) and *Rajendra Kumar Bose* v. *Mohim Chandra Ghose* (3). It was held in those cases that if the existence of a tenure be admitted or proved, the dispute in regard to any plot of land then becomes a question of parcel or no parcel and the Plaintiff is bound to prove that the lands of which he claims *khas* possession is outside the admitted tenure. But as pointed out by Banerjee, J., in *Sheodeni Roy* v. *Chatterbhuj Roy* (4), the case of *Rhidoy Krista Mistri* v. *Nabin Chandra Sen* (2) is clearly distinguishable. "There the Plaintiff sued to recover *khas* possession of some land which he alleged was outside the howla or tenure held by the Defendant and which the Defendant had encroached upon by extending the boundary of the howla. In the present case there is no admission by the Plaintiffs that the lands in suit are contiguous to the admitted holding of the Defendants or that they have come to the possession of the Defendants by encroachment. The mere fact that the Defendants hold some lands as tenants under the Plaintiffs would not be sufficient to throw upon the Plaintiffs the burden of showing that in respect of any other land in the zamindari which the Defendant may be found to be in possession of, they have no right as tenants. The burden of proof in a case like this lies upon the Defendant and this view is quite in accordance with the rule laid down by this Court in several cases of which we need only refer to two, namely, *Raj Kissen Mookherjee* v. *Pearee Mohan Mookherjee* (5) and *Batai Ahir* v. *Bhagobatty Koer* (6)." The observations quoted above apply fully to the facts of the present case and I entirely agree with them. In the case of *Rajendra Kumar Bose* v. *Mohim Chandra Ghose* (3) it does not clearly appear from the report whether the lands in dispute in that case were admitted to be contiguous to the holding of the Defendant, but the learned Judges in that case followed the case of *Rhidoy Krista Mistri* (2). I am of opinion that the principle there laid down which is the same as that laid down in *Rhidoy Krista Mistri's* case (2) should be held applicable to cases where the lands sought to be recovered are admitted by the Plaintiffs to be contiguous to the holdings of the Defendants or that they have come to the possession of the Defendants by encroachment. A person may hold 10 bighas of land in one corner of a village consisting of thousand bighas of lands and the zamindar should not be called upon to prove that any land in the village which the Defendant may be in possession of, however distant it may be from the Defendant's *jote*, is outside the *jote*. I am accordingly of

(1) 9 C. W. N. 144 (1904).
(2) 12 C. L. R. 457 (1883).
(3) 3 C. W. N. 768 (1894).
(4) 12 C. L. J. 376 (1894).

(2) 12 C. L. R. 457 (1883).
(3) 3 C. W. N. 768 (1894).
(5) 20 W. R. 421 (1873).
(6) 11 C. L. R. 476 (1882).

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opinion that the onus is upon the Defendants to prove that the lands are included in her *jotes*.

The lower Appellate Court refers to a *solenama* in which Shiboo, the Defendant's husband and predecessor-in-title, admitted that the lands appertained to the *juma* of one Ram Kalpa and that he had taken possession of the same from the time of the *solenama* as purchaser from Ram Kalpa and that Court held that the said admission makes the Defendant's present case that the lands appertain to the ancestral *jote* of her husband unworthy of credit. The lower Appellate Court relied upon the admssion contained in the *solenama*, disbelieved the evidence for the Defendants and held that they have no tenancy right. The Court of first instance discussed the evidence more fully and found that Ram Kalpa had no right to or possession of the lands, that Ram Kalpa had admittedly no *jote*, that the admission made in the *solenama* by Shiboo, the husband of the Defendant No. 3, had been sufficiently explained away by the evidence and that Shiboo was in possession from before the *solenama*. The learned Munsif however did not come to any definite finding that the lands did appertain to any *jote* of Shiboo, but dismissed the suit on the ground that the onus was upon the Plaintiff to prove that the lands were outside the *jotes* of Shiboo, and that they had failed to prove the same. But the lower Appellate Court came to a finding upon the evidence that Defendants had no right or tenancy in the lands. That is a finding which cannot be interfered with in second appeal.

The last question is whether the Defendant should not be allowed an opportunity to prove that the lands are included in her *jotes*, seeing that the original case of the Plaintiffs has been found to be false. It is true, the Plaintiffs claimed *khas* possession of the lands on the ground that the lands were *khas* lands of the *putni*, but they also sought for a declaration that the Defendants had no right to the lands, that they were trespassers, and claimed *khas* possession by ejecting the Defendants. The Defendant in resisting the admitted *putnidars'* claim for recovery of *khas* possession of lands within the *putni* was bound to show that the lands were part of her *jotes*. She did adduce evidence on the point; that evidence was considered by the lower Appellate Court which came to a finding that the tenancy was not proved. Under the circumstances it cannot be said that the Appellant was prejudiced in any way. The case cannot of course be sent back for allowing the Defendant No. 3 an opportunity merely to show that the lands are adjacent to her *jotes*, as prayed for on behalf of the Appellant.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 500 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 12 and 13, February.
Judgment, 13, February.

PROTAP CHANDRA ROY, Defendant, Appellant,

v.

JUDHISTIR DAS & anr., Plaintiffs, Respondents.

Landlord and tenant—Suit by former in ejectment—Burden on latter to prove land held in tenancy—Jurisdiction to entertain suit after remand—Suit originally tried by District Judge, after remand tried with consent of parties by Subordinate Judge—Irregular assumption of jurisdiction no objection.

Where a suit valued at Rs. 1,368 was heard in the first instance before the District Judge and dismissed as barred by

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limitation, but on appeal the High Court remanded it for trial on the other issues, and thereafter the case having been transferred to the file of the Subordinate Judge, the latter officer with the consent of the parties tried and disposed of the suit:

Held—*That if the order of the High Court did not place any restrictions on the power of the District Judge to transfer the case, the transfer was authorised by sec. 24 of the Civil Procedure Code. But if the remand order was interpreted to have directed the District Judge himself to try the suit, it was not a case of the trying Court not having local or pecuniary jurisdiction but of that Court assuming jurisdiction in an irregular manner, and the parties having consented to the trial by the Subordinate Judge were not entitled to object to it on that ground on appeal; and it was immaterial that as a consequence of such trial appeal from his decision on facts lay before the District Judge and not before the High Court.*

What was held in RAJENDRA KUMAR BOSE *v.* MOHIM CHANDRA GHOSE (2) *was that when a tenant has been in possession of land ostensibly as part of an admitted tenure, it lies upon the landlord in a suit in ejectment to prove in the first instance that the land is his khas property.*

It is not the law that because a Defendant is found to be a tenant of some land under the Plaintiff, the burden is thereby cast upon the Plaintiff to establish that the land he seeks to recover is outside the tenancy of the Defendant. The burden would ordinarily be on the Defendant to prove the tenancy under which he claims to hold it.

NANDA LAL GOSWAMI *v.* JAJNESWAR HALDAR (3) *and* SHEODENI ROY *v.* CHATTERBHUJ ROY (4), *referred to.*

(2) 3 C. W. N. 763 (1894).
(3) 6 C. W. N. 105 (1901).
(4) 12 C. L. J. 376 (1894).

This was an appeal from a decision of E. Panton, Esq., District Judge, Murshidabad, dated 26th January 1912, reversing that of Babu Debendra Bejoy Bose, Subordinate Judge, Murshidabad, dated 19th December 1910.

The material facts will appear from the judgment.

Babus Dwarkanath Chakraburty and *Kali Kinkar Chakraburty* for the Appellant.

Mr. Sinha and *Babus Mohini Mohun Chatterjee, Gurudas Sinha* and *Probodh Chandra Dutt* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendant in a suit which was commenced so far back as the 11th July 1906 for declaration of title to immoveable property, and for recovery of possession thereof. The relief claimed in the plaint was valued at Rs. 1,368. The suit was tried in the first instance by the District Judge and was dismissed on the ground that the claim was barred by limitation. On appeal to this Court it was held by a Division Bench, on the 19th August 1909, that the decision of the District Judge upon the question of limitation was erroneous, and the case was remanded to him in order that it might be tried on issues other than that of limitation and disposed of accordingly. The case thereupon went back to the District Judge who recorded the following order on the 5th January 1910 : "As the suit belonged to the file of the Subordinate Judge, let it be re-heard and disposed of by him in accordance with the order of the High Court." It is not clear whether this order was recorded as a matter of form or whether the District Judge had considered the terms of the order of remand by which the case was

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remitted to him for decision. However that might be, when the matter came before the Subordinate Judge, he felt some difficulty and asked the parties if they had any objection to the trial of the suit by him in view of the terms of the order of remand made by the High Court. They stated that they had no objection; the Subordinate Judge accordingly proceeded to try the suit, and partially decreed it. Against this decree an appeal was preferred by the Plaintiff and a cross-appeal was filed by the Defendant. The District Judge modified the decree of the Subordinate Judge, allowed the appeal of the Plaintiff and dismissed the cross-appeal of the Defendant.

The Defendant has now appealed to this Court, and on his behalf the decree of the District Judge has been assailed on the ground that the proceedings before the Subordinate Judge as also before the District Judge were held in contravention of the terms of the order of remand, that in substance the proceedings were without jurisdiction and that consequently the decree of the District Judge should be discharged and the suit re-tried by him in accordance with the order made by this Court. This position has been contested by the Plaintiff-Respondent and we have arrived at the conclusion that the contention of the Appellant cannot possibly succeed.

The order of remand made by this Court is capable of one of two interpretations neither of which is of any assistance to the Defendant-Appellant. In the first place, if the order be interpreted to mean that it was the intention of this Court that the suit should go back to the District Judge with liberty to make such order as he was competent to pass under the law, it is plain that under sec. 24 of the Code of 1908 the District Judge could re-transfer the suit to the file of the Subordinate Judge. The terms of sec. 24 are comprehensive enough to cover a case of this description inasmuch as it provides that the District Court may at any stage transfer any suit pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same or to withdraw any suit pending in any Court subordinate to it and try and dispose of the same or transfer the same for trial or disposal to any subordinate Court competent to try or dispose of the same or transfer the same for trial or disposal to the Court from which it was withdrawn. An order of this description could be made at any stage and it was immaterial in this case that the suit had to be tried on the evidence recorded by the District Judge who heard the case in the first instance. Order 18, rule 15, sub-rule 2, authorises the Court to which the case might be transferred to try it on the evidence previously taken. In this view the proceedings before the Subordinate Judge were in all respects regular. In the second place, the order of remand may be interpreted to mean that this Court intended that the suit should be heard on the merits by the District Judge and that he was not at liberty to transfer the suit to a subordinate Court under sec. 24 of the Code of 1908. If this be the true meaning of the order of remand, it is clear that the validity of the proceedings before the Subordinate Judge cannot be questioned by either of the parties. They agreed before the Subordinate Judge that the suit should be tried by him, and they are not entitled to resile from the position they deliberately took up before him. The case before us is not one of exercise of jurisdiction by a Court which had no local or pecuniary jurisdiction over the subject-matter of litigation; the case is one of assumption of

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jurisdiction by a competent Court in an irregular manner. It cannot be disputed that if the District Judge had reported to this Court that he was not in a position to re-try the suit in accordance with the order of remand, it would have been open to this Court, in modification of its previous order, to transfer the case to the Subordinate Judge for disposal. In other words, the assumption of jurisdiction by the Subordinate Judge would have been perfectly regular, if he had been authorised by this Court instead of by the District Judge. Consequently there is no force in the argument that the parties could not by their consent confer jurisdiction upon a Court which had no jurisdiction to try the controversy between them, and the case is fully covered by the principle explained in the case of *Gurdeo Singh* v. *Chandrika Singh* (1). It has been contended however that the case mentioned is distinguishable, because here the effect of the trial of the suit by the Subordinate Judge has been to change the forum of appeal. If the District Judge had tried the suit, an appeal against his decree would, no doubt, have lain to this Court; on the other hand the result of the trial by the Subordinate Judge has been that a first appeal lay to the District Judge and a second appeal lies to this Court; in other words, this Court is not placed in a position to examine the case on the evidence so far as the facts in controversy are concerned. But this circumstance does not affect the position of the parties in so far as they consented to re-trial of the suit by the Subordinate Judge. It is true that the forum of appeal has been altered, but the appeal has been heard by a Court which would have been competent to hear the appeal if the Subordinate Judge had been authorised by this Court to assume jurisdiction in this matter. On these grounds we hold that the contention of the Appellant that the proceedings before the Subordinate Judge and the District Judge must be set aside as wholly irregular cannot be sustained.

We now turn to the merits of the appeal. The history of the question in controversy between the parties may be very briefly narrated. The Plaintiff claims to be a lessee from one Sokhichand under an instrument taken on the 21st April 1906. The property in suit belonged originally to Mrs. Larrubts whose right, title and interest was purchased by one Howard at an execution sale on the 15th March 1881. Howard was unable to obtain possession and commenced a suit on the 11th August 1888 for recovery of possession as against persons now represented by the Plaintiff. He obtained a decree on the 20th September 1889 which was subsequently affirmed on appeal on the 30th November 1891. On the 28th October 1892, Howard transferred the decree to Sokhichand who was placed in actual possession by the Execution Court on the 14th November 1894. The case for the Plaintiff is that he has been wrongly kept out of possession by the Defendants of 76 bighas of land included within the lease granted in his favour by Sokhichand. The case for the defence in substance is that the land in dispute is included in a lease granted by the Plaintiff or his predecessor on the 7th February 1888. It is plain that if it is established as a fact that the land is included within the lease granted to the Defendant, the latter would be entitled to succeed, because although at the time of the grant the Plaintiff had no title, the subsequent title acquired by him would, under section 43 of the Transfer of Property Act, enure for the benefit of

(1) I. L. R. 36 Cal. 192 at p. 200: s. c. 5 C. L. J. 671 (1907).

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the Defendant. The question in controversy consequently is, whether the land claimed by the Plaintiff is or is not included in the lease granted to the Defendant on 7th February 1888. It is unfortunate that no express issue was raised upon this point in the Court of first instance, which dismissed the suit on the ground of limitation. When, after remand, the case was taken up by the Subordinate Judge, the Plaintiff prayed that there might be a local investigation and he stated in his petition, dated the 24th January 1910, that the allegation of the Defendant was untrue and that the land covered by the lease of 7th February 1888 was altogether different from the land in suit, although adjacent thereto. This application was opposed by the Defendant, who contended that local investigation was not necessary. The Plaintiff thereupon stated that he would not press his application for local investigation. The pleaders on both sides further intimated to the Court that the parties would not examine any witnesses in the case, with the result that the suit was re-heard on the evidence on the record. The Court of first instance came to the conclusion that upon the evidence as it stood there was reason to hold that a part of the land in controversy was identical with a part of the land covered by the lease of 7th February 1888, although it was impossible to identify accurately the land covered by the lease with the land in suit and the Court directed that this question of identity be determined in the execution proceedings. The District Judge on appeal has set aside this decree on the ground that the evidence does not establish the identity of the land and that the Plaintiff is consequently entitled to an unconditional decree.

The view taken by the District Judge has been assailed before us on the ground that the burden of proof has been erroneously placed upon the Defendant, and on the authority of the decision of this Court in the case of *Rajendra Kumar Bose* v. *Mohim Chandra Ghose* (2), it has been argued that inasmuch as the Defendant has been found to hold some land as a tenant under the Plaintiff, the burden is upon the Plaintiff to establish that the land now in dispute is not included within the tenancy of the Defendant. The contention thus broadly formulated is plainly erroneous. As was explained in the case of *Nanda Lal Goswami* v. *Jajneswar Haldar* (3), the case of *Rajendra Kumar Bose* v. *Mohim Chandra Ghose* (2) must be taken to have been decided on its own special facts. In that case, the Plaintiff sought to eject the Defendant who had admittedly been in long and peaceful occupation of the disputed property, and what was held was that when a tenant has been in such possession of the land ostensibly as part of an admitted tenure, it lies upon the landlord in a suit in ejectment to prove in the first instance that the land is his khas property. We are not prepared to assent on principle to the proposition that because a Defendant is found to be a tenant of some land under the Plaintiff, the burden is thereby cast upon the Plaintiff to establish that the land he seeks to recover is outside the tenancy of the Defendant. The contrary view is supported by the decision of this Court in the cases of *Sheodeni Roy* v. *Chaturbhuj Roy* (4) and *Gopini Debi* v. *Ram Taran Tewari* (5). We must therefore overrule the contention of the Defendant that the District Judge has erroneously thrown the burden of proof upon him.

(2) 3 C. W. N. 763 (1894).
(3) 6 C. W. N. 105 (1901).
(4) 12 C. L. J. 376 (1894).
(5) 19 C. W. N. 140 (1911).

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The question remains, however, whether the decree of the District Judge should be affirmed. Upon an examination of the proceedings in the case, it appears to be reasonably clear that when the Defendant on the 12th April 1910 opposed the application of the Paintiff for local investigation, she did so on the view of the law expounded in the case of *Rajendra Kumar Bose* v. *Mohim Chandra Ghose* (2), namely, that the burden was upon the Plaintiff to establish that the disputed land was beyond the limits of the tenure of the Defendant. The conduct of the parties is unintelligible on any other hypothesis. It is also plain that the form of the issue, which was vaguely framed, misled the parties, and the evidence was not specifically directed to this point. In these circumstances, we are of opinion that an indulgence may be shown to the Defendant and fresh opportunity given to him to establish that the disputed land is included, wholly or partially, in the lease of the 7th February 1888. The burden is clearly upon the Defendant to establish this allegation, and in the interest of justice we think that an issue should be remitted to the District Judge upon this point. The issue will be in these terms: "Is any portion of the disputed land covered by the lease granted to the Defendant by Rakhal Das Boral on the 7th February 1888; and, if so, which portion?" The parties will be at liberty to adduce evidence, oral and documentary, in support of their respective cases on this point. The Defendant has in this Court expressly desired to have a local investigation and we think that a local investigation should be held at her instance; but the costs of the local enquiry must in the first instance be paid by her. We accordingly remit the above issue to the District Judge with the direction that a local enquiry be held at the instance of the Defendant, and that liberty be reserved to the parties to adduce evidence, oral and documentary, in support of their respective cases. The District Judge will receive the evidence, come to a finding upon the issue and send up the records to us for final disposal of the appeal. As the litigation has now lasted nearly for eight years, the District Judge will expedite the enquiry before him and liberty will be reserved to him to transfer the matter to the Subordinate Judge, if he considered it necessary to do so; but in any event the finding must be arrived at by the District Judge himself and returned to this Court within two months after the receipt of the record by him.

This order, however, is made subject to the following condition: The Defendant must, on or before the 27th February next, deposit in this Court to the credit of the Respondent the sum of Rs. 185, *viz.*, Rs. 41-8 as the costs of this appeal, Rs. 95-6 as the costs of the appeal before the District Judge and the balance as part of the costs incurred by the Plaintiff in the Court of first instance. If the deposit is made as directed, the issue will be remitted. If it is not so made, the appeal will stand dismissed with costs in all the Courts. As soon as the sum payable by the Appellant is deposited in this Court, the Respondent will be at liberty to withdraw the same.

(2) 3 C. W. N. 763 (1894).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES
NOS. 384 AND 387 OF 1910.

COXE, J.
D. CHATTERJEE, J.

1913,
Heard, 18, 19 & 22, December.
1914,
Judgment, 12, January.

H. MANNERS and others, Defendants, Appellants,
v.
HARIHAR KOER and others, Plaintiffs, Respondents.

*Landlord and tenant, dispute between, as to possession of specific plot—Onus of proof—*Zerait, *necessity of proving disputed land—*Khas *land other than* zerait*—Tenure or holding—Lease to ticcadar to cultivate—Lands cultivated if raiyati land of ticcadar—Ticcadar's possession of land outside tiece, if adverse to landlord.*

The owner of a tauzi is entitled to recover possession of lands within it, unless the Defendants whom he sues can prove a subordinate interest that derogates from his title. The fact that he has failed to prove certain specific titles which he in addition asserted in the disputed lands, does not deprive him of this initial presumption in his favour. The onus which is on the Defendants must be discharged by them.

The fact that the Defendants were raiyats holding other lands of the village would make them settled raiyats of the disputed lands if they proved that these lands were held by them as raiyats, but not, if they fail to prove this.

RAJENDRA KUAR *v.* MOHIM CHANDRA (2) *did not apply to this case, in which the Defendants held a number of separate holdings and did not claim to hold the land in suit as part of any specific holding.*

Where a ticcadar took a lease of lands far exceeding 100 bighas in area to " cultivate by sowing indigo or other crops either by means of khas *cultivation or through tenants " :*

Held—*That it was a tenure.*

A tenure-holder does not become a raiyat with respect to all land that comes into his direct possession, because the lease authorises him to cultivate these lands.

A proprietor may hold other lands besides zerait *lands in* khas *possession, and because he recovers possession of lands on the basis of the presumption arising from his proprietorship, it does not follow that the land is* zerait, *nor does the fact that he fails to prove the land to be* zerait *prevent him from claiming the land, if the Defendant fails to establish a subordinate interest in it.*

Where the proprietors having purchased certain holdings suffer them without any arrangement to be taken possession of by their ticcadars, the ticcadar's possession of such holdings do not become adverse to the proprietors.

These were appeals preferred on the 19th August 1910, against the decree of A. Mellor, Esq., District Judge of Zilla Darbhanga, dated the 2nd June 1910.

The material facts will appear from the judgment.

Mr. Manners in person and *Babu Soroshi Charan Mitra* for the Appellants.

Babus Umakali Mukherji and *Baldeo Narain Singh* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

COXE, J.—These appeals arise out of two suits which have been tried together. The Plaintiffs are proprietors of tauzis Nos. 5475 and 5952. The Defendants are the proprietors of the Konasnagar Concern. An interest in the village was leased to the Defendants for the years 1283 to 1289. The proprietors were then in *khas* possession till 1298 and the property was again leased to the Defendants from 1298 to 1312 and 1313. One suit relates to the Plaintiff's ancestral share and the other to their purchased share, but the Plaintiffs

(2) 3 C. W. N. 763 (1894).

seek the same relief in both suits, and it is unnecessary to distinguish between them. The lease of the purchased share terminated a year before that of the ancestral share, but nothing appears to turn on this circumstance.

The Plaintiffs' case was that the Defendants during the time of the lease brought the land in suit under their own cultivation as ticcadars and that therefore they (the Plaintiffs) were entitled to possession of it at the end of the lease. The suits have been decreed by the learned District Judge and the Defendants appeal.

The point on which most stress has been laid by the Appellants is that the Court below has erred in placing the burden of proof upon the Respondents. It is said that the Plaintiffs claimed this land under specific titles, 25 bighas as old *zerait*, 13 bighas as bought by the landlords at execution sales, etc., etc. Therefore it is argued, the Plaintiffs were bound to prove that these specific lands in suit belonged to them in these ways and to identify the lands that constituted the old *zerait* (the lands that were bought in execution), and so on.

I think that this view is quite erroneous. The Plaintiffs are the owners of the tauzis. The disputed land is in these tauzis and therefore they are entitled to it, unless the Defendants can prove a subordinate interest that derogates from their title: *Dinanath* v. *Ganesh Chandra* (1). The fact that the Plaintiffs went further and stated that the land bore a particular character did not deprive them of the initial presumption in their favour. If their description of the character of the land was mistaken, it was none the less the duty of the Defendants to prove their subordinate interest. As a matter of fact the Plaintiffs did not plead that the land was old *zerait*, etc. That statement is not to be found in the pleadings, but in the evidence. The learned District Judge did not call on the Defendants to begin, because, as he says, at that stage of the case he did not see sufficient reason to necessitate departure from the usual order, the usual order being, I suppose, that the Plaintiffs should begin. When the Plaintiffs were thus wrongly called on to begin and one of them was in the box, he gave evidence to the effect that so much land was old *zerait* and so on. It may be conceded that Plaintiffs have entirely failed to prove these allegations. But their failure does not in my opinion entitle the Defendants to claim land admittedly belonging to the Plaintiffs, unless they can prove a subordinate interest.

The Court below has held that the Defendants have entirely failed to prove that they have any right to the specific lands in suit, and this finding in my opinion has not been overthrown. The principal Appellant has argued his appeal himself and has put his case as well as an experienced advocate could have put it for him. But he has been compelled to rely principally on the contention that the burden of proof was on the Plaintiffs and has been unable to meet the decision of the Court below that, so far as these individual lands are concerned, there is practically no evidence beyond his bare word that the Defendants have any subordinate interest in them. It is quite clear that the Defendants have a great deal of raiyati land. We have not heard the Respondents, and possibly they may be in a position to contest even this. But so far as I can gather from the record, without hearing the Respondents' objections, it seems to me clear that the Defendants are settled raiyats of the village and would be entitled to occupancy rights in the lands in suit if they could

(1) 18 C. L. J. 544 (1913).

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show that they had ever held these particular lands as raiyats. But though there is plenty of evidence that they held plenty of land as raiyats, they fail to show that it was just the land that they so held.

It is not necessary to make more than a passing reference to the record-of-rights. It shows the disputed land as being "bakast" of the ticcadars, but it shows the same thing with reference to land in the possession of the Appellants that is not disputed. It is impossible therefore to ground any definite conclusion on these entries in favour of either side.

It is argued that with regard to certain plots the Plaintiffs' suit is barred by time on their own showing. Those plots are said by the principal Plaintiff to have been purchased during the continuance of the ticcas in execution of decrees obtained by the Plaintiffs for rent that accrued due before the ticcas. With regard to these plots the evidence of the principal Plaintiff is—"we took no steps for taking possession of the land which we bought at auctions. As the factory was in possession, we allowed the manager to take the land. At the time of the sales the land was in the possession of the tenants. I did not send word to the factory to say that they could take it. I simply took no steps to occupy it, and allowed the factory to do what they liked with it." This was in 1893 or 1894, and the ticcas terminated 12 or 13 years later.

In these circumstances I do not think that any question of limitation can arise. It may be that if the old tenants had remained in possession, the suit might have been barred against them, but they are not in possession. In some unexplained way the Defendants have obtained possession, and as they were the representatives of the proprietors, their possession was equivalent to the possession of the landlords until the expiration of the ticcas, and no question of limitation could arise.

It has been suggested that the ticcas themselves show that the intention of the parties was to create a raiyati interest in the Defendants. This contention, however, is quite untenable. The land far exceeds 100 bighas and it is evident that there are many tenants upon it. It is covenanted in the ticca that "I, the ticcadar, by remaining in possession and occupation of the lease-hold property shall cultivate the same by sowing indigo or other crops either by means of *khas* cultivation or through tenants." I have no doubt that this was intended to be, and was, a tenure, and it is impossible to hold that when a tenure of a village is granted, the tenure-holder becomes a raiyat with respect to all land that comes into his direct possession, because the lease authorises him to cultivate such land.

It appears to me therefore that the Defendants have failed to show that they have any subordinate interest in the lands in suit which justifies them in withholding possession of them from the Plaintiffs, whose title to them is admitted. This of course does not imply that the Plaintiffs have succeeded in showing that the lands are *zerait* within the restricted meaning attached to that word and its synonyms in sec. 120 of the Bengal Tenancy Act. That fact however does not prevent the Plaintiffs from claiming the land if the Defendants cannot establish a subordinate interest in it. There is much land of which a landlord is entitled to direct possession which does not come within sec. 120. I may mention, merely as instances, land purchased from a raiyat, either voluntarily or in execution, land let by a registered lease to a non-occupancy raiyat at the end of the lease, and land escheating to the landlord on the death of a tenant. A

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landlord is entitled to direct possession of these and other kinds of land, although they are not *zerait* as defined in the Act. The lands now in suit may be of such a nature, and as it is not shown that the Defendants held these specified lands as raiyats, they must be deemed to have held them as landlords or perhaps as trespassers and in either case the Plaintiffs would be entitled to succeed. Reference has been made to the case of *Rajendra Kuar* v. *Mohim Chandra* (2), but that case in my opinion has no application. The question in that case was whether the lands in suit did or did not form part of a tenure held by the Respondents. Here the Defendants hold a number of separate holdings and do not claim to hold the land in suit as part of any specific holding.

The principal Appellant in his argument has taken exception very temperately and very properly to a remark of the learned District Judge, that the kastkari rights of the Defendants did not authorise them to lay violent hands on any other land. It is not suggested that the Defendants have been guilty of any resort to violence, and the remark of the District Judge is unwarranted and ought not to have been made. I trust, however, that the observation, however badly expressed, was not intended to apply to any particular action of the Defendants, but to a hypothetical case that was put by the learned District Judge by way of argument.

In my opinion the Court below was right in holding that the burden of proof rested on the Defendants and that they had failed to discharge it. The appeal is dismissed with costs.

D. CHATTERJEE, J.—I think the Defendants have failed to discharge the onus that lay on them to prove a subsisting tenancy. I therefore agree in dismissing the appeal with costs.

Appeal dismissed.

(2) 3 C. W. N. 763 (1894)

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDERS

NOS. 138, 158, 159 & 160 OF 1911.

D. CHATTERJEE, J.
WALMSLEY, J.
1914,
Heard,
19, June.
Judgment,
8, July.

MOHARAJ BAHADUR SINGH & ors, Decree-holders, Appellants,
v.
SURENDRA NARAIN SINGH & ors., Objectors, Respondents.

Lis pendens—*Civil Procedure Code (Act XIV of 1882), secs. 248, 311, 313—Non-service of notice, if an irregularity—Sale of putni mahal for arrears of rent—Purchase of putni mahal by executor of deceased dar-putnidar's estate in his personal capacity—Application under sec. 311 for setting aside sale by executor as such and under sec. 313 by purchaser in personal capacity.*

D, the zamindar of a putni mahal, sold his interest in the property and then brought a suit against C, the putnidar, for the arrears of the putni rent that had accrued prior to the sale and obtained a decree. Shortly afterwards D died after having assigned all his properties including this decree to certain trustees for the payment of his debts. The putni was then put to sale under Reg. VIII of 1819 for non-payment of rent and F who was the executor to the estate of his deceased father who was dar-putnidar under C deposited the arrears for saving the dar-putni interest from the effect of the sale and obtained possession as mortgagee. The putnidari interest in the putni was then sold in execution of a money decree and purchased by S. The trustees appointed by D took out execution and the putni was fixed for sale. F instituted a regular suit for a declaration that the decree under

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execution was not a rent-decree and for a perpetual injunction upon the decree-holders not to execute the same against the putni mahal. The suit was decreed by the first Court but dismissed by the High Court on the 8th April 1908. F applied for leave to appeal to the Privy Council which was granted on the 30th June 1908. The trustees applied for the sale of the putni mahal and they impleaded C alone as judgment-debtor. The sale took place on the 6th July 1908 and the property was purchased by F in his personal capacity. For setting aside the sale, an application under sec. 311, C. P. C., was made by S as also by F as executor to the estate of his deceased father. F also made an application in his personal capacity under sec. 313, C. P. C. The District Judge allowed these applications and set aside the sale. The judgment of the Privy Council was subsequently delivered on the 4th March 1914 and it was held that the suit instituted by F should have been decreed.

Held—*That the facts were sufficient to attract the application of the doctrine of* lis pendens *and the act of the decree-holders in bringing about the sale could not prejudice F and make the judgment of the Privy Council nugatory.*

SHIVLAL v. SHAMBHU (6), *distinguished.*

That, although C, the former putnidar, had no subsisting interest in the property, the decree-holders having chosen to treat him alone as the judgment-debtor were bound to serve him with notice of the sale, though they were not bound to issue notice on S, the purchaser of the putni interest, whose suit failed, whom they were not willing to treat as the legal representative of C and against whom they did not want to execute the decree.

That non-service of notice under sec. 248, C. P. C., was not a mere irregularity and vitiated the sale.

RAGHUNATH DAS v. SUNDER DAS (10), *followed.*

That the auction purchase of the putni was made by F in his personal capacity and he was not debarred from applying under sec. 313, C. P. C., for setting aside the sale.

These were appeals preferred on the 20th March 1911, against an order of S. S. Skinner, Esq., District Judge of Zilla Purnea, dated the 16th February 1911.

The facts material to this report will appear from the judgment.

Dr. Rash Behary Ghosh and *Babu Sarat Kumar Mitra* for the Appellants.

Babu Golap Ch. Sarkar, Dr. Dwarka Nath Mitter, Mr. G. Sarkar, Babu Jogendra Nath Mookerjee and *Maulvi Md. Mustafa Khan* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

These four appeals arise out of four applications to set aside a sale in execution of a decree, three under sec. 311 and one under sec. 313 of the Civil Procedure Code.

A short narrative of the facts which are a little complicated may help a clear conception of the questions raised in these appeals.

Roy Dhanpat Singh Bahadur was the zamindar of Pargana Haveli in the District of Purnea and his nephew Babu Chatrapat Singh held a putni of a property named Saifgunge in this pargana. Dhanpat sold his zamindari interest in this pargana to one Bhugwanbaty Choudhurani in June 1893, and then brought a suit against Chatrapat for the arrears of the putni rent that had accrued due prior to

(6) I. L. R. 29 Bom. 435 (1905).

(10) 18 C. W. N. 1058 (1914).

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the said sale and ultimately obtained a decree on the 10th of July 1898. On the 12th of July 1896 Dhanpat assigned all his properties including this decree to certain trustees for the payment of his debts and died in September following. The trustees applied for the execution of the decree and on the objection of Chatrapat, Maharaj Bahadur, the heir-at-law of Dhanpat, was added as a party to the execution.

In the meantime Chatrapat did not pay the putni rent and Bhagwanbati put up the putni to sale under Reg. VIII of 1819. Mr. A. H. Forbes who was the executor to the estate of his deceased father A. J. Forbes, who was a dar-putnidar under Chatrapat, deposited the arrears under sec. 13 (4) of the Regulation for saving the dar-putni interest from the effect of the sale and obtained possession as mortgagee under the provisions of that section.

Chatrapat's interest in the putni was then sold in execution of a money-decree and purchased by Surendra Narayan Singh on the 1st of September 1902.

The trustees took out a second execution in 1904 and Surendra Narain objected on the ground that the putni could not be sold as the decree was a money-decree. This objection was rejected and the putni was fixed for sale on the 10th of November 1904.

Mr. A. H. Forbes tried to avert the sale, but was unsuccessful, and Surendra's suit for the same purpose was dismissed up to the High Court. On the 9th of July 1906, A. H. Forbes instituted a regular suit for a declaration that the decree under execution was not a rent-decree and for a perpetual injunction upon the decree-holders not to execute the same against the putni mahal. This suit was decreed by the first Court but dismissed by the High Court which held that the decree was a rent-decree and could be executed as such. This was on the 8th of April 1908. Forbes applied for leave to appeal to the Privy Council and the trustees applied for the sale of the putni mahal on the 9th May 1908 and they impleaded Chatrapat alone as judgment-debtor. The leave to appeal to the Privy Council was granted on the 30th June 1908. The property was sold on the 6th July 1908 and was purchased by Mr. A. H. Forbes in his personal capacity for Rs. 61,200.

For setting aside this sale one application under sec. 311 was made by Surendra Narain, and his case was numbered as 665 of 1908, and has given rise to Appeal No. 138 of 1911 in this Court, and another application under sec. 311 was made by Chatrapat; his case was numbered as No. 16 of 1909, and has given rise to Appeal No. 158. A third application under sec. 311 was made by Mr. A. H. Forbes as executor to the estate of his deceased father. This was case No. 17 of 1909 in the Court below and has given rise to Appeal No. 160.

Mr. A. H. Forbes in his personal capacity as the auction-purchaser of the mahal made an application under sec. 313 of the Civil Procedure Code on the ground that the judgment-debtor had no saleable interest at the time of his purchase. His case was numbered as 18 of 1909 and has given rise to Appeal No. 159 of 1911 in the Court. These four cases were tried together by the District Judge of Purnea who has allowed all of them.

These appeals are by the decree-holders.

It has been contended on their behalf that the Court below has erred in setting aside the sale on the ground of non-service of notice on Chatrapat because—

(*a*) the application for execution was a continuation of the previous application

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and therefore no fresh notice was necessary;

(*b*) Chatrapat had no subsisting interest in the property and no notice was necessary;

(*c*) Chatrapat actually appeared in the case and therefore no notice was necessary;

(*d*) Notice was practically served on his am-muktear Sokilal and he must have known of it;

(*e*) Surendra was not entitled to notice as he purchased *pendente lite.*

Secondly, it was argued that notice or no notice, the sale could not be set aside unless the Applicant could make out substantial injury.

Thirdly, that at the time of the sale there was a subsisting decree of the High Court declaring that the decree was a decree for rent for which the tenure was liable; the subsequent reversal of the decree by the Privy Council cannot invalidate the sale.

Fourthly, that Forbes could not be allowed to take up two inconsistent positions: when he applied under sec. 311 he did so on the basis of the judgment-debtor having some interest: he could not at the same time say under sec. 313 that the judgment-debtor had no interest.

The learned Vakil for the Respondents contends that it is not necessary to go into the question of notice and other questions raised by the Appellants as the doctrine of *lis pendens* furnishes a complete defence of the order made by the lower Court. This argument is based on the judgment passed by the Privy Council in the appeal of Mr. Forbes on the 4th of March 1914, more than three years after the judgment under appeal in this case. The sale took place on the 6th July 1908, pending the appeal to the Privy Council. The doctrine of *lis pendens* rests on the principle that the law does not allow litigant parties to give to others pending the litigation rights over the property in dispute so as to prejudice the Opposite Party: *Bellamy* v. *Sabine* (1), *Wigram* v. *Buckley* (2); and it is now settled that this doctrine applies to sales *in invitum*. See *Radhamadhab* v. *Monohar* (3), *Motilal* v. *Karrabuddin* (4), *Dinonath* v. *Shamabibi* (5). The property in dispute was the putni in which the Plaintiff had substantial rights; the object of the suit was to restrain the Appellants from selling this property in execution of their decree of July 1896 and the Appellants brought about the sale pending the appeal to the Privy Council which ultimately held that the Plaintiffs' suit ought to have been decreed. We think that the facts are sufficient to attract the application of the doctrine of *lis pendens* and the act of the Appellants in bringing about the sale cannot prejudice the Plaintiff and make the judgment of the Privy Council nugatory.

The learned Vakil for the Appellants contends that the principle of *lis pendens* does not apply as the *lis pendens* is the very suit in which the decree in pursuance of which the sale took place was passed; and he relies on the case of *Shivlal* v. *Shambhu* (6) The decree however in execution of which the sale took place was not the decree under appeal to the Privy Council. The sale took place under the decree of July 1896 and the *lis pendens* was the suit of July 1906. The decree of the High Court which was under appeal to the Privy Council only held that the decree of July 1896 was a rent-decree and was not the decree under which the sale took place. The Bombay case therefore does not help

(1) 1 DeG. & J. 566 (1857).
(2) [1894] 3 Ch. 483.
(3) I. L. R. 15 Cal. 756 (1888).
(4) I. L. R. 25 Cal. 179 (1897).
(5) I. L. R. 28 Cal. 23 (1900).
(6) I. L. R. 29 Bom. 435 (1905).

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the Appellants and no other case is relied on in their favour.

In this view of the case it is not necessary to decide the grounds urged by the learned Vakil for the Appellants. As the case, however, may not terminate in this Court, we may shortly express our views on the said grounds. Supposing that the application for execution made on the 9th May 1908 was one for the continuation or restoration of the previous application, it is not shown that it was within one year of the last order passed on that application; the issue of a notice was therefore necessary.

It is true that Babu Chatrapat Singh had no subsisting interest, but the Appellants chose to treat him alone as the judgment-debtor and were therefore bound to serve him with notice. It has not been shown that he appeared in this case and there is nothing to show that Sokilal was authorised to receive any notice for him. As regards Surendra, his title-suit has been dismissed by the High Court and the Appellants were not willing to treat him as the legal representative of Chatrapat and did not want to execute the decree against him; they were not therefore bound to issue notice upon him. It has been contended, however, that the non-service of notice under sec. 248 was a mere irregularity and as no substantial injury is found to have occurred, there was no reason for setting aside the sale. Some recent cases based on the case of *Malkarjun* v. *Narahari* (7) seem to support that contention. See *Ashton* v. *Madhabmoni* (8), *Kumed Bewa* v. *Prosunno Kumar* (9). The matter, however, was before the Privy Council in the case of *Raghunath Das* v. *Sunder Das* (10), and their Lordships approved of the decision of this Court in *Gopal Chandra Chatterjee* v. *Gunamani Dasi* (11) and distinguished the *case of Malkarjun* (7) as one in which notice had been actually served on a person whom the Court then held to be the legal representative. The learned District Judge was therefore right in holding that the non-service of the notice under sec. 248 vitiated the sale.

The previous consideration disposes of the second and the third grounds.

As regards the fourth ground, the auction-purchase was made by Mr. Forbes in his personal capacity and we do not think that he should be debarred from applying under sec. 313 of the Civil Procedure Code in this capacity. He had tried his best to prevent the sale in order to protect the interests that he had as the executor of his father and when all his efforts failed, he made the purchase in reliance on the decree of the High Court. That decree has now been set aside and he should not be a loser, because the Appellants insisted upon a sale which has been interdicted by the decree of the Privy Council.

In this view of the case the appeals are all dismissed with costs (five gold mohurs) in each case.

Appeals dismissed.

(7) I. L. R. 25 Bom. 337 : s. c. L. R. 27 I. A. 216 (1900).
(8) 14 C. W. N. 660 (1910).
(9) I. L. R. 40 Cal. 15 (1912).

(7) I. L. R. 25 Bom. 337 : s. c. L. R. 27 I. A. 216 (1900).
(10) 18 C. W. N. 1078 (1914).
(11) I. L. R. 20 Cal. 370 (1892).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL ORDERS Nos. 181 AND 189 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 17 and 18, December.
1914,
Judgment, 4, June.

NRIPENDRA NATH SAHU and another, Appellants,
v.
ASHUTOSH GHOSE, Respondent.

Provincial Insolvency Act (III of 1907), sec. 37, sub-secs. (1) and (2)—Fraudulent preference, how determined—Debtor's intention and motive material—Preference due entirely to pressure from creditor if fraudulent—Creditor if may plead good faith—Onus.

Under sec. 37 of the Provincial Insolvency Act, good faith on the part of the creditor affords him no protection where the intention of the debtor to give him preference is established, although sub-sec. (2) of the section protects a person who in good faith and for valuable consideration has acquired title through or under a creditor of the insolvent.

"Preference" implies an act of free will, and there can be no "preference" where the act is the result of pressure brought to bear on the debtor by the creditor, though there would be fraudulent preference where, notwithstanding that the payment or disposition might never have been made but for the importunity of the creditor, it is also a fact that the payment never would have been made but for the desire to prefer.

The presumption of fraudulent intention may be repelled, if it is apparent that the debtor acted in fulfilment of a prior agreement, but it will not suffice to prove that the debtor was moved by a mere sense of honour or a sense of duty or of moral obligation or that he acted from motives of kindness or gratitude. The intention of the debtor is the paramount consideration and if the transaction can be properly referred to some other motive than that of giving the particular creditor a preference over the others, the payment is not fraudulent.

In the determination of the question whether a person is able or unable to pay his debts as they become due from his own money, the fact that he has money locked up which at a later period may be available for the payment of his debts is immaterial.

Where an act is impeached as a fraudulent preference, the onus of proof lies on the Receiver, even if the debtor was insolvent at the time of the payment and knew himself to be so, though in such a case the onus may shift.

These were appeals from an order of H. P. Duval, Esq., District Judge, 24-Parganas, dated 30th January 1913.

The facts of the case are sufficiently set out in the judgment.

Mr. B. Chakrabarty, Babus Ram Chandra Majumdar and *Jnanendra Nath Sircar* for the Appellant (in No. 181).

Babu Mahendra Nath Roy and *Babu Panchanan Ghose* for *Babu Khetter Mohon Sen* for the Appellant (in No. 189).

Babus Bipin Behari Ghose and *Satish Chandra Mookerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—These appeals are directed against an order under sec. 37 of the Provincial Insolvency Act. On the 4th December 1911, Nilratan Mandal and his four brothers executed a mortgage for Rs. 9,000 in favour of one of their unsecured creditors Nripendra Nath Sahu. On the 27th December 1911 and 14th February 1912, they executed two other mortgages, one for Rs. 6,000 and another for Rs. 10,000 in favour of their unsecured creditor Gopinath Mandal. On the 19th February 1912, a third creditor, Kissen Chand Kesari

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Chand, applied to the District Judge under sec. 5 of the Provincial Insolvency Act so that the mortgagors might be adjudicated insolvents. The application was granted and a local pleader, Babu Asutosh Ghose, was appointed Receiver in due course. On the 26th September 1912, the Receiver applied to the Court to take action under sec. 37 and to annul the three mortgages mentioned. This application was granted on the 30th January 1913, and the present appeals, which have been preferred by the two mortgagees separately, are directed against that order. The District Judge has found that when Nilratan Mandal executed and registered the deeds, he knew that he was not in a position to pay his debts, and, that, consequently, the mortgages must be declared fraudulent and void as against the Receiver. This decision of the District Judge has been assailed before us on the ground that all the elements necessary to justify an order for avoidance of the mortgages under sec. 37 have not been established, and that the requirements of that section have not been fully appreciated. In our opinion, this contention is well-founded and the case must be re-tried.

Sub-sec. (1) of sec. 37 of the Provincial Insolvency Act—we quote so much only of the sub-section as applies to the present case—provides as follows: "Every transfer of property or of any interest therein, by any person unable to pay his debts as they become due, from his own money, in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Receiver and shall be annulled by the Court." It is plain that before a transfer by a debtor of any interest in his property is avoided under this section, four conditions must be fulfilled, namely, *first*, the debtor must, at the date of the transaction, be unable to pay from his own money his debts as they fall due; *secondly*, the transaction must be in favour of a creditor or of some person in trust for a creditor; *thirdly*, that the debtor must have acted with the view of giving such creditor a preference over his other creditors; and *fourthly*, the debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached. There is no dispute that the second and fourth elements are present in the case before us. The mortgagees were creditors of the mortgagors on the dates when the mortgage instruments were executed; the promissory notes, on which they had previously advanced moneys to the Mandals, were unpaid on those dates; these have been produced and proved to represent genuine transactions. There is also no question that the insolvency petition was presented by the creditor on the 19th February 1912, that is, within three months after the earliest of the three mortgages impeached. The controversy has thus centred round the first and third conditions. Before we discuss the requirements of these two conditions, we may point out, however, that where an act is impeached as a fraudulent preference, the onus of proof lies on the Receiver [*Ex parte Lancaster: Re Marsden* (1)] and it has been said [*Re Laurie: Ex parte Green* (2)], that the burden of proof lies on the Receiver, even if the debtor was insolvent at the time of the payment and knew himself to be so, though the view has been indicated that

(1) 25 Ch. D. 311 (319) (1883).
(2) 5 Manson 48 (1898).

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in such a case the onus might shift: *Re Eaton & Co.: Ex Viney* (3), *Re Lake* (4).

The first point for consideration is, whether the mortgagors were, on the dates of the mortgage transactions, able to pay from their own money their debts as they fell due. The evidence on the record does not enable us to pronounce an opinion upon this matter. There were, it must be remembered, three mortgages on the 4th December 1911, 27th November 1911, and 14th February 1912. Each of these transactions has to be tested from the point of view of the condition mentioned, and it is quite conceivable that the mortgagors though not able to pay from their own money their debts as they fell due on the 14th February 1912, might have been in a very different position more than two months earlier, on the date of the first of the three mortgages. Two factors must plainly be taken into account on the date of each transaction, namely, what were the debts payable by the mortgagors on that date, and, what was the money then available to them to pay such debts. In this connection, it may be pointed out that in the determination of the question, whether a person is able or unable to pay his debts, as they become due, from his own money, the fact that he has money locked up which, at a later period, may be available for the payment of his debts is immaterial: *Re Washington Diamond Mining Co.* (5). The question, therefore, whether the debtors were, at the date of each of the three mortgages impeached, unable to pay, from their own money, their debts as they fell due must be investigated.

The second point for consideration is, whether the debtors acted with the view of giving the mortgagees a preference over their other creditors. Here, again, the case of each mortgagee and of each transaction with him has to be separately considered in the light of the surrounding circumstances on the several dates. A particular transaction may be set aside as a fraudulent preference, only if it is proved that it was carried out with the substantial or dominant view of giving the creditor a preference over the other creditors: *Ex parte Griffith* (6), *Ex parte Hill* (7). This need not be the primary result aimed at; it is sufficient that it should be the object aimed at in bringing about the primary result: *Ex parte Taylor* (8), *New v. Hunting* (9). If the transaction can properly be referred to some other motive than that of giving the particular creditor a preference over the other creditors, the payment is not fraudulent, because the invalidity of the transaction arises from the intention on the part of the debtor to act in fraud of the bankruptcy law, that is, to prevent the distribution of his property rateably among all his creditors: *Bills v. Smith* (10). To ascertain whether the giving of a preference to the particular creditor, that is, putting that creditor in a better position relatively to the other creditors than that in which he would be placed by the Bankruptcy Law [*Bourne v. Graham* (11)] was the dominant view in the debtor's mind, the proper test to be applied is—was the act done voluntarily, a question the solution of which depends primarily on the enquiry from which party did the proposition originate: *Re Eaton & Co.* (3), *Re Vautin* (12). A voluntary

(3) [1897] 2 Q. B. 16 (17).
(4) [1901] 1 K. B. 710.
(5) [1893] 3 Ch. 95.

(3) [1897] 2 Q. B. 16.
(6) 23 Ch. D. 69 (1883).
(7) 23 Ch. D. 695 (704) (1883).
(8) 18 Q. B. D. 295 (1886).
(9) [1897] 1 Q. B. 607 (617).
(10) 6 B. & S. 314 (1865).
(11) 2 Jur. N. S. 1226 (1856).
(12) [1900] 2 Q. B. 325.

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disposition is an act moving from the debtor; the question, consequently, in most cases, if not always, is—did the thing move from the debtor or from the creditor: *Ex parte De Tastet* (13), *Strachan* v. *Barton* (14). If it moves entirely from the debtor, in the sense that it was his spontaneous act uninfluenced by any circumstance which tend to rebut the presumption that the bankrupt made a distinction among his creditors, then the transaction will be condemned as a fraudulent preference: *Ex parte Tempest* (15), *Bills* v. *Smith* (10). If, on the other hand, the proposal for the payment or the disposition of the property comes entirely from the creditor and is not collusive, the transaction will stand: *Crosby* v *Crouch* (16), *Ex parte Hall* (17). To take one illustration: if it is established that the transaction was the result of real pressure brought to bear on the debtor by a creditor, it cannot be deemed his spontaneous act: *Tomkins* v. *Saffery* (18), *Butcher* v. *Stead* (19), *Sharpe* v. *Jackson* (20), *Joakim* v. *Secretary of State* (21); for, as Lord Cairns said in *Butcher* v. *Stead* (19), the use of the word "preference" implies an act of free will, so that there can be no preference where the act is the result of pressure. The pressure, as we have said, must have been real; that is, it must have operated on the mind of the debtor as the dominant influence affecting him: *Re Boyd* (22), *Re Bell* (23); and it must not have been fraudulent: *Ex parte Reader* (24), *Miller* v. *Sheoprasad* (25), *Phulchand* v. *Miller* (26). In the case of *Re Bell* (23), it was observed that the preference is fraudulent, if it is established that, notwithstanding that the payment or disposition might never have been made but for the importunity of the creditor, it is also a fact that the payment never would have been made but for the desire to prefer—*Brown* v. *Kempton* (27), *Graham* v. *Candy* (28) [*Ex parte Hall*: *in re Cooper* (17)]. To take another illustration, the presumption of fraudulent intention may be repelled, if it is apparent that the debtor acted in fulfilment of a prior agreement: *Halliday* v. *Holgate* (29), *Ex parte Kevan* (30), *Ex parte McKenzie* (31), *Ex parte Hodgkin* (32). But it will not suffice to prove that the debtor was moved by a mere sense of honour or a sense of duty or of moral obligation, or that he acted from motives of kindness or of gratitude: *Re Fletcher* (33), *Re Vingoe* (34), *Re Blackburn* (35), *Re Jukes* (36). In every case, as was said in *Sharpe* v. *Jackson* (20), the state of mind of the debtor is the paramount consideration; the intention or view to prefer the creditor as the *causa causans* of the debtor's conduct is the cardinal point round which the whole question

(10) 6 B. and S. 314 (1865).
(13) 17 Ves. 247 (1810).
(14) 11 Exch 647 (1856.
(15) L. R. 6 Ch. App. 70 (1870)
(16) 11 East 255 (1809).
(17) 19 Ch. D 580 (1882).
(18) 8 App. Cas. 213 (1877)
(19) L R. 7 H. L. 839 (1875).
(20) [1899] App. Cas. 419.
(21) I. L. R 3 All. 530 (1881).
(22) 6 Morrell 209.
(23) 10 Morrell 15 (1892).
(17) 19 Ch. D. 580 1882).
(20) [1899] App. Cas. 419.
(23) 10 Morrell 15 (1892)
(24) L. R. 20 Eq. 758 (1875).
(25 L R. 10 I A. 98: s. c. I. L. R. 6 All. 84 (1883).
(26) I. L R. 7 All 840 1885).
(27) 19 L. J. C. P. 169 (1850).
(28) 3 F. and F. 206 (1862).
(29) 17 L. T. 18 (1867.
(30) L. R. 9 Ch. App. 752 (1874).
(31) 28 L. T 486 (1873).
(32) L. R. 20 Eq 746 (1875).
(33) 9 Morrell 8 (1891).
(34) 1 Manson 416 (1894).
(35) [1899] 2 Ch. 725.
(36) [1902] 2 K. B. 58

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Contents.

NOTES.

The late Mr. E. P. Ghose.

We deeply mourn to record the death of Mr. E. P. Ghose, Bar.-at-law. which sad event occurred on Monday last. Mr. Ghose was a member of the Calcutta Bar of more than 21 years' standing. He, like his father, the late Mr. P. Ghose, the well-known author of mathematical works, was a self-made man. He was one of the men who by steady work, tact and ability in conducting criminal cases had acquired the reputation of a good criminal lawyer. He went to Comilla in a criminal case in indifferent health and contracted double pneumonia and died after a very short illness. He was a very popular member of the Bar and it is not too much to say that he had made no enemies. It is seldom that one comes across a man of such good nature and equable temper. The news of his sudden death was received by the members of the Bar with great sorrow. His funeral was attended by a very large number of members of the Bar and by several members of the Bench amongst whom we noticed the Hon'ble the Chief Justice, the Hon'ble Mr. Justice Woodroffe, the Hon'ble Mr. Justice Chapman and the Hon'ble Mr. Justice Richardson. Those who were unable to attend expressed their deep sympathy with the members of the bereaved family. Mr. Ghose leaves a widow and a young daughter who is at school in England. It is particularly sad that Mr. Ghose died the day before Mrs Ghose landed in India.

State and the Criminal.

In the *Canadian Law Times* for September last appears an address recently delivered by William N. Gemmill, President of the Illinois Branch of the American Institute of Criminal Law and Criminology, on the subject "Who is the criminal and what shall we do with him?" The address is too long for reproduction, but at a time when Government has shown itself distinctly open to suggestions in favour of criminal reforms, some extracts made from it may be expected to command the attention of the reformers in the rank of Government officials, and will in any case be appreciated by all students of criminal sociology.

One of the most striking passages which we quote below has reference no doubt to conditions in England and America produced by the so-called industrial revolution. But sooner or later the same conditions will appear in India. And possibly, the very fact that India has not yet been seriously affected makes it incumbent upon us to know where she is tending and devise means to arrest her progress towards similar conditions before it is too late.

Among the many arrests each year, says Mr. Gemmill, are thousands who belong to the army of defeat. They are not men and women, but the remnants of them only, from which have departed hope, pride, ambition, courage, self-sacrifice and all those qualities which distinguish the human from the animal world. The army of derelicts is an appalling menace to every large city. They all march under the one banner upon which is written in large letters the word "failure." In the summer they sleep in parks, under side-walks and along the wharfs. In the winter they hibernate in cheap lodging-houses, where they are stored in tiers one above the other upon beds of filth, vermin, and disease and from which they go to carry contagion and death to the whole community. . . . . They are not criminals; they are but drift wood cast upon a turbulent sea, and they have no power to beat back the waves which rock and drive them. Few of them can be regenerated or restored, for no foundation is left upon which to build.

Here are other extracts on the same subject.

The forty thieves of Ali Baba went forth to rob and plunder whomsoever they might meet, in order that they might store up great wealth for the future. But not so with most of our modern thieves. These are generally, creatures of sudden impulse, and who are moved either

by great stress of circumstances, or overcome by a strong temptation against which they have not been trained to fight. They are neither physical or mental defectives, but from childhood their moral training has been neglected.

Among the others whom we call thieves are many youngmen struggling earnestly against all sorts of adverse conditions to make a living for themselves and their families, but who fail under a very heavy burden imposed by economic conditions. . . . . They have become thieves because the flesh was not equal to the incessant grind of daily toil, unrelieved by moments of leisure and pleasure.*

On the existing system of sending persons convicted of crimes to prisons and penitentiaries, Mr. Gemmill's observations have as much application to conditions in India as in Europe and America.

A closer study of the problem of crime and its punishment has led those most familiar with the subject to the conclusion that it is not the wisest course for the state or the community that they should annually spend millions of dollars in erecting and maintaining prisons, whose sole purpose is to afford a place where the penalties inflicted under the law may be carried out. From a financial standpoint, the whole scheme of imprisonment has been a failure, and has laid upon the state a great burden of debt. From the broader standpoint of the highest interest of the state, it is still more a failure. Few persons who have been committed to these prisons for any length of time come out of them better citizens than when they entered. Their physical, mental and moral well-being have generally suffered a shock, from which few of them recover. It is important to inquire whether there is not some better way by which the state may be relieved of this great financial burden, and at the same time the men and women who have violated the criminal laws allowed to work out their penalties in a manner which will not so completely destroy their manhood and womanhood. Many men who are heads of families are daily committed to prison, and their families, left without proper support, become a charge upon the community. When we send a man to the workhouse, and leave behind him his destitute family, without properly providing for its care, we certainly have not strengthened the good citizenship of the state. Many of the families thus left dependent are surrounded by all sorts of evil conditions, and their natural trend is towards a violation of the criminal laws. It is of the utmost importance, therefore, that when the state takes away the head of a family it should see to it that from the earnings of such person, while in the custody of the state, there shall be paid to the dependent family at least part of such earnings. Two questions, threfore, arise in dealing with the execution of the penalty:

First: How can the state, in the best and most economical way, care for those who have been found guilty of violating the criminal laws, and upon whom penalties have been imposed?

Second: How can the state best provide for the care of the prisoners' dependent families?

* For a graphic description by a journalist who made a hand study of conditions in London, see "People of the Abyss" by Jack London. (T. Nelson and Sons.)

These problems are not new in this country. Many states have been buying and equipping large farms, upon which prisoners, whose crimes are less grave in character, are employed. Here the prisoners work in the open at all kinds of agricultural pursuits. Most of such farms are either self-supporting, or yield a net income to the state, and the health and morals of the prisoners much improved.

Mr. Gemmill gives details of some instances of successful operations of this character in the United States. The farm idea, according to him, has also long been accepted in nearly all European countries, and he cites successful instance, from Switzerland, Germany, Belgium and Holland.

But Mr. Gemmill makes his strongest point when he urges the claim of the dependents of the person sent to prison.

It is undoubtedly a great step in advance for the state to remove its prisoners from penitentiaries, jails and work-houses, and employ them upon large farms, where they will be more healthy, and where the expense of maintenance will be much less, and the cost to the state reduced to a minimum. Yet it is still more important that the state shall see to it that some part of the earnings of the prisoners, under its charge, in whatever character of work these prisoners may be engaged, shall be paid to their dependent families. Many states have worked out the problem more or less satisfactorily. Among them is Massachusetts, whose legislature, in 1911, passed an Act providing that the master or keeper of any reformatory or penal institution, who has confined in such institution one found guilty of deserting his wife or minor child, where such wife or minor child is in needy or necessitous circumstances, may pay over to the probation officer, at the end of each week, a sum equal to fifty cents for each day's labour performed by the person in his charge. During the first year of the operation of this law $6,831·89 was paid to dependent families.

During the same year the Legislature of Ohio passed a law providing that the county from which a prisoner was sent to state prison should be required to pay out of its general revenue, the sum of forty cents per day for each prisoner confined, who had deserted his wife or minor child, and that this sum should be expended, by such county, under the direction of the county Judge, for the maintenance of such dependent wife and minor child. This law was amended in 1913, and now provides that the payment of from two to five cents per hour shall be made to the dependent family for all the time a prisoner is employed during his imprisonment. During the first month of the operation of the new law $6,931 09 was paid to dependent families. This went to 377 different persons.

Mr. Gemmill is by no means a theorist. He has had eight years' experience upon the Bench in Chicago, two years of which, he says, were spent in the worst Police district in that city and the practical proposals which he makes at the end of the paper for his own State of Illinois cannot

be dismissed as the recommendations of a crank. These we reproduce *in extenso*, if only to show that these are very practical proposals made by one who has made a special study of successful instances of the kind of provisions he advocates and who is fully cognisant of the difficulties, economic and moral, that have to be overcome to put such proposals into practice,

To this end the following recommendations are made:—

1st. The State of Illinois should purchase at least two farms containing from 3,000 to 4,000 acres each, and located nearest to its centres of population. Honor camps should be established on these farms, and a sufficient number of prisoners placed in them to erect the buildings necessary for proper housing; barns for the stock, and workshops for the men engaged in the various industrial pursuits.

The farms should be so divided as to permit the prisoners to engage in all kinds of agricultural work, including forestry, fruit-raising, gardening and stock-raising.

2nd. Every warden or superintendent of prisons should be directed to pay to the dependent family of a prisoner not less than 50 cents per day for any day such prisoner works, while incarcerated.

3rd. The system of fining prostitutes and inmates of disorderly houses should be abolished, and the Courts given the power to commit such persons to an institution where they may receive proper care.

4th. The adult probation law should be so amended as to include within its provisions every crime except murder and treason.

5th. It should be made a penal offence for any one to solicit, induce or admit a boy under the age of twenty-one years to a house of prostitution, or to a disorderly house, for the purpose of prostitution.

CURRENT INDIAN CASES.
(CIVIL.)

Contract to indemnify.

NALLAPPA REDDI *v.* VRIDHA CHALA, I. L. R. 37 Mad. 270.

Where there is a contract to indemnify, if a decree has been passed against the person entitled to indemnity the correctness of that decree cannot be impeached by the person bound to indemnify.

Hindu Law.

G. GOPAL KRISHNAM RAZU *v.* S. VENKATANARASA, I. L. R. 37 Mad. 273.

Marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual *brahmachari* or of a *sanyasi*, and this being so, debts reasonably incurred for the marriage of a twice-born Hindu male are binding on the joint family properties.

Hindu Law.

G. PAPARAYUDU *v.* G. RATTAMMA, I. L. R. 37 Mad. 275.

A widow inheriting to the husband's estate obtains only a qualified interest in her husband's properties. The nearest contingent reversioners can bring suits attacking the widow's ailenations in her life-time.

Hindu Law.

P. SUTHAI AMMAL *v.* P. NACHIAR AMMAL, I. L. R. 37 Mad. 286.

A step-mother cannot succeed to the property of her step-son as a *gotraja sapinda*.

Hindu Law.

KANKAMMAL *v.* ANANTHAMATHI, I. L. R. 37 Mad. 293.

The stridhan property of a Hindu female devolves on her husband, and failing her husband on his *sapindas* in the order laid down in the Mitakshara with reference to the succession to the property of a male.

Penal assessment.

AYYAPARAJA *v.* SECRETARY OF STATE FOR INDIA, I. L. R. 37 Mad. 298.

The right of the Government to levy penal assessments is conditional on the land being communal.

Ancient documents, proof of.

REMUVIEN *v.* VEERAPPUDAYAN, I. L. R. 37 Mad. 455.

The practice prevailing in the Courts in the Madras Presidency in the trial of suits is that when *primâ facie* evidence of custody and of the date of a document purporting to be 30 years old is given, the Court generally marks the document on the footing that there is sufficient evidence to justify its being marked as an exhibit at that stage. It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption under sec. 90 of the Evidence Act should not be drawn with respect to the document.

Hindu Law—Father's debts.

VEMEGAPALE *v.* A. RAMANADHAN, I. L. R. 37 Mad. 458.

A member of a temple committee was directed to pay the costs of a certain litigation out of his own pocket.

Held—That this liability constituted a debt which his sons and grandsons were bound to pay as a sacred obligation.

Reviews.

THE LAW OF MORTGAGE IN INDIA. *By Rashbehary Ghose, M. A., D. L., Sometime Tagore Law Professor, Calcutta. Fourth Edition, Volume II. Calcutta: Thacker, Spink & Co. 1914. Price Rs. 10.*

This is the Supplement to Dr. Ghose's Tagore Law Lectures for 1875-76, published separately from the former in the present edition. It contains the texts of the Transfer of Property Act and of the Rules framed by the High Courts under sec. 104 of that Act and of Order XXXIV of the 1st Schedule to the Civil Procedure Code, which replaces the procedural sections of the Transfer of Property Act relating to mortgages. All the provisions of the Transfer of Property Act excepting only those which have no appreciable bearing on the Law of Mortgage are annotated. In this way, secs. 9 to 38, secs. 47, 53, the Chapters on Leases, Exchanges and Gifts and secs. 133, 135, 136 out of the Chapter on Actionable Claims are the only provisions of the Act not furnished with commentaries. Order 34 of the Civil Procedure Code is, as was to be expected, annotated. It is the quality and not the quantity of the notes that marks out these commentaries from others of its kind, and what the practitioner chiefly seeks to find from them are the references to the main treatise which in this edition has been already issued in a separately bound volume (Vol. I) and previously reviewed in these columns. To notice this well-known work in greater detail would be a work of supererogation. Needless to say, also, that the commentaries are entirely up to date.

THE LAW OF MUNICIPAL CORPORATIONS IN BRITISH INDIA. *By P. Durai Swami Aiyangar, B. A., B. L. Madras: P. Durai Swami Aiyangar. 1914.*

Mr. Aiyangar has followed up his two volumes of compilations of the Municipal Legislation of this country by an examination and discussion in the present volume of the leading principles which ought to govern the administration of the powers and duties given to Municipal bodies by the Law. The difficulties of this task may be gathered from the circumstance, amongst others, that the statutory provisions made for different provinces differ in many points and the law applying to the larger towns is necessarily more complicated than the law applying to mofussil areas, and they amongst themselves present differences in plan and working. Yet, without doubt the principles underlying all this variety of special and local enactments are the same and they agree moreover with the general principles underlying similar legislation in England and America. It is to the author's credit that he has not allowed his official position as Vakil to the Corporation of Madras to narrow his outlook of Municipal life, which in an official has a tendency to become parochial. Laying aside mere details he has sought to gather light on general principles from judicial decisions, English, American and Indian, and from authoritative text-books—not to mention the statutes themselves. All these materials have been co-ordinated with much skill and insight, and we are convinced that it is just the kind of book, which, those who have the fortunes of the nascent Municipal life of India in their guidance should have constantly in their hands, so that they may not cramp its growth by paying too great attention to details which if unwisely enforced tend to defeat the very purpose which brought them into existence. Municipal regulations have an inveterate tendency to harden into unmeaning rituals, if their general purpose is even for a moment lost sight of and in no department of civic life is the need for subordinating the rules to principles more urgent. The book, we should add, would for the same reason be no less useful to lawyers.

STUDENT'S GUIDE TO THE LAW OF EVIDENCE IN INDIA. *By Alex. Kinney, Administrator-General, Bengal. Calcutta: Thacker, Spink & Co. 1914. Price Rs. 2-2.*

This is not Mr. Kinney's first essay in the very praiseworthy work of interpreting the statutes prescribed for the law examinations to students. In the present instance, he has sought to state, briefly and in simple language, the main provisions of the Indian Evidence Act, with explanatory notes here and there—just the kind of book a student needs to introduce him to the Act and make its array of apparently lifeless provisions appear co-ordinated and interesting.

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turns: *In re Ramsay* (37). The case before us has not been considered from this point of view, and the facts must be fully investigated before an order of annulment can be made.

We may add that, on behalf of the Appellants, strenuous effort was made to sustain the view that if the creditor has acted in good faith and in ignorance of the intention of the debtor, he is protected from the operation of sec. 37. In our opinion, this contention is not well-founded, and that under sec. 37 of the Provincial Insolvency Act, which is substantially identical with sec. 48 of 46 and 47 Victoria, Chap. 52, good faith on the part of the creditor affords him no protection, where the intention of the debtor to give him a preference is established although sub-sec. (2) of sec. 37 protects a person who, in good faith and for valuable consideration, has acquired a title through or under a creditor of the insolvent. See *Davison* v. *Robinson* (38), *Butcher* v. *Stead* (19) and *Sharpe* v. *Jackson* (20) which show how the law on this point in England has undergone a material change in recent years. (Williams on Bankruptcy Practice, Eighth Edition, p. 255.)

The result is that these appeals are allowed, the order of the District Judge set aside, and the case remanded to him for re-trial on additional evidence. The costs of these appeals will abide the result. We assess the hearing fee in each case at two gold mohurs.

Let the record be sent down as soon as possible.

BEACHCROFT, J.—I agree.

Appeals allowed.

(19) L. R. 7 H. L. 689 (1875).
(20) [1899] App. Cas. 419.
(37) [1908] 2 K. B 50 (84).
(38) 8 Jur. N. S. 791 (1857).

[PRIVY COUNCIL.]

[APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF CENTRAL PROVINCES.]

LORD MOULTON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1913,
29, June.

RAMCHANDRA MARTAND WAIKAR & ors., Appellants,
v.
VINAYAK VENKATESH KOTHEKAR & anr., Respondents.

[*Delivered by* MR. AMEER ALI.]

ERRATA.

Page 3, line 27, "*propositus*" should read "common ancestor."

Page 20, line 19, "*propositus*" should read "common ancestor."

Page 21, line 27, the words "On the whole" should be omitted—the paragraph should commence "Their Lordships are of opinion . . ."

[REPORTER'S NOTE.—This case was reported at p. 1154 of 18 C. W. N. The consequential alterations in our report will be—

18 C. W. N., p. 1154, col. 1, line 28—"*propositus*" should read "common ancestor."
" " " line 37—"*propositus*" should read "common ancestor."
" p. 1166, col. 1, line 40—"*propositus*" should read "common ancestor."
" p. 1175, " 2, line 10—"*propositus*" should read "common ancestor."
" p. 1176, col. 1, line 22—The words "On the whole" should be omitted—the paragraph should commence "Their Lordships are of opinion . . ."]

PRIVY COUNCIL

[Appeal from Allahabad.]

Lord Moulton.
Lord Sumner.
Lord Parmoor.
Sir John Edge.
Mr. Ameer Ali
1914,
Heard,
23, February.
Judgment,
18, March.

Lala Mahabir Prasad and others, Appellants,
v.
Musammat Taj Begam and ors., Respondents.

Purdanashin *lady, mortgage by, in favour of her legal adviser—Transaction to be closely scrutinised—Onus—Proof that deed was explained to executant and she understood it—Relations cognisant of execution—Inference that deed properly explained if follows—Stipulation in deed to substitute for properties mortgaged partitioned share of estate under partition, if inoperative—Pleader and client, relationship ceases on passing of judgment, when the time for appealing has not expired.*

T, a purdanashin *lady, and S, her brother, who had been parties in a partition suit with members of their family were represented in that suit by one R, as their pleader. The suit terminated in their favour; but before the time for appeal had expired, property belonging wholly to T was mortgaged in favour of R to secure an advance of Rs. 8,000, of which Rs. 4,773 was said to have been cash and the balance went mainly, if not entirely, in the discharge of moneys due from S. A clause was inserted in the bond to the effect that after the partition should have been effected the property awarded to T should be substituted for the mortgaged properties, and it was admitted that the effect of this would be to quadruple the amount of property. There were concurrent findings that this clause was not properly explained to the lady, but the Trial Court held it to be of no consequence, as the clause was inoperative. The Trial Judge upheld the deed subject to a reduction of the stipulated interest which he held to be unconscionable, being mainly influenced by the consideration that the relatives of the lady must have been aware of the transaction, because her brother was a co-signatory of the deed and two of her relatives were the identifying witnesses, but the brother was personally interested in carrying through the transaction by which he derived advantage at the expense of the lady, and the other relatives generally were taking gross advantage of her unprotected state:*

Held—*That this was a case of the legal adviser to a* purdanashin *woman acting the part of money-lender to her and procuring the execution by her of a mortgage-bond to secure its repayment, and it was difficult to conceive a case in which the Court would be entitled, and indeed obliged, to examine the transaction with closer scrutiny or to insist more sternly on the mortgagee supporting the heavy onus of showing that the client was fully aware of the meaning and effect of the deed, and that the transaction was a fair and honest one.*

That the Trial Judge was in error in holding that in the mortgage-bond, if otherwise valid, the clause which was clear in its language stipulating for the substitution of T's partitioned properties for the property mortgaged would be inoperative.

That, in the circumstances, the relatives of T should in no way have been regarded as the defenders of her interests.

The facts of this case sufficiently appear from their Lordships' judgment and from the judgment of the High Court. The terms of the mortgage deed, dated the 3rd June 1895, were fairly simple, except the last clause which was as follows:—

"A 4/5ths share of the property that falls on partition to the lot of me, Taj Begam, *i.e.*, with the exception of a 1/5th share, which would remain incumbered with the debt due under the bond in favour of Piare Lal, the adopted son of Khushi Ram of Ajitpur, amounting to Rs. 2,000, shall be deemed to

LALA MAHABIR PRASAD *v.* MUSAMMAT TAJ BEGAM.

be hypothecated to secure payment of the debt due to the mortgagee."

Both the Courts below concurred in finding that the last clause was not explained to the lady and that she did not understand its meaning or effect on her interests. The High Court (Richards and Tudball, JJ.) concluded their judgment in the following terms:—

"As a result of our consideration of the evidence, we cannot say that we are satisfied that the Musammat understood the terms of the deed or the nature of the transaction. We think that having regard to the relations which undoubtedly existed between Raghubir Saran and the Musammat, the onus lay very heavily upon him and those who represent him to show a complete appreciation of the nature of the transactions by the Musammat He was taking the deed from his client in the name of a *benamidar* One of the witnesses for the Plaintiff explains that this was done by Raghubir Saran because " if it had not been done in the name of a *benamidar*, he would probably be dismissed from being a pleader." We also think that having regard to the nature of the whole transaction and the hard terms of the mortgage itself, Musammat Taj Begam was entitled to have had separate and independent advice to enable her to understand what she was doing, and we think that it was incumbent upon Raghubir Saran to take care that the Musammat had such independent advice. It is perfectly clear upon the evidence that she had none. Her brother, a youngman, who had just come into his(?) property and who had been borrowing money from the Upper India Bank, was not a fit and proper person to advise her. Assuming that he knew the entire nature of the transaction, it is clear that he was interested in getting his own debts discharged at the expense of his sister. If money was actually brought into the room, it was, according to the evidence, Sultan who brought it in. It has been suggested that the consideration for the bond was money which had been advanced for the purposes of carrying on the litigation in which Sultan Muhammad Khan and Musammat Taj Begam were involved. It is quite true that up to a certain point their interests in this litigation were not inconsistent. But there is not a particle of evidence to show that this money was advanced for any such purpose."

Hence these appeals.

Mr. L. DeGruyther, K.C., and *Mr. B. Dube*, for the Appellants, submitted that the evidence upon the record sufficiently established that the lady executed the bond in suit after understanding its terms and the effect thereof. The bond was attested by the near relations of the lady who had given evidence in support of the Plaintiff. The endorsement of the Sub-Registrar was strong evidence that the lady heard the contents of the deed and acknowledged receipt of the consideration. The last clause of the deed was not very material. The question of execution of the bond by the lady was separate from the question of her not having acted on independent advice. If she really understood the terms of the bond, as the Subordinate Judge who saw the witnesses found that she did, the Plaintiff's claim ought to be allowed, but the Court was competent to relieve her from such terms thereof as it considered unconscionable or onerous. The Subordinate Judge was right in allowing the Plaintiff's claim in part only in view of these considerations.

Their Lordships reserved judgment without hearing

Mr. A. M. Dunne for the Respondents.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—In this case their Lordships have before them two appeals from two decrees and judgments, dated 2nd December 1910, of the High Court of Judicature for the North-Western Provinces, Allahabad. The suit in which these appeals are brought is a suit for the recovery of money due on a registered mortgage-bond alleged to have been exe-

LALA MAHABIR PRASAD *v.* MUSAMMAT TAJ BEGAM.

cuted by the Defendants Musammat Taj Begam and Syed Sultan Muhammad Khan in favour of Lala Ramanuj Dayal (since deceased), father of the Appellants. The facts of the case are as follows :—

Musammat Taj Begam is a *purdanashin* woman, and Sultan Muhammad Khan is her younger brother. Prior to June 1895 they had been engaged in law suits with the members of their family to recover their shares of inheritance in the property of their father Syed Mir Khan, and one Babu Raghubir Saran had been the pleader representing them in these suits. The litigation terminated in their favour, and a decree of partition had been pronounced, but the time for appeal had not expired, and it is not seriously contested that at the date of the execution of the mortgage-bond Babu Raghubir Saran still stood to the Defendants in the position of their legal adviser. The mortgage-bond was nominally executed in favour of Lala Ramanuj Dayal, but it is admitted that he was only *benamidar* for Babu Raghubir Saran who was the real mortgagee. The amount of the money advanced by the mortgagee was Rs. 8,000, of which Rs. 4,773 is said to have been cash, and the balance went mainly, if not entirely, in the discharge of moneys due from the Defendant Syed Sultan Muhammad Khan. The greater part of this indebtedness appears to have been to Babu Raghubhir Saran himself. The whole of the property mortgaged belonged solely to Musammat Taj Begam.

It follows, therefore, that we have a case of the legal adviser to a *purdanashin* woman acting the part of money-lender to her, and procuring the execution by her of a mortgage-bond to secure its repayment. It is difficult to conceive a case in which the Court would be entitled, and indeed obliged, to examine the transaction with closer scrutiny, or to insist more sternly on the mortgagee supporting the heavy onus of showing that the client was fully aware of the meaning and effect of the deed, and that the transaction was a fair and honest one. The Appellants have entirely failed to support either of these issues. The Judge of the Court of first instance has found that the interest, which was compound interest at the rate of 1 per cent. per month (with half-yearly rests), was unconscionable, and has accordingly reduced it, and although an appeal was brought against this part of his decision it was dismissed by the High Court, and the appeal against that decision has not been persisted in before their Lordships. The case of the Appellants with regard to the other issue is equally hopeless. There are concurrent decisions of the two Courts to the effect that the Plaintiffs have failed to prove that the meaning and effect of the mortgage-bond was duly explained to the real Defendant Musammat Taj Begam. The facts relating to this issue are as follows :—

The property set out in the schedule to the mortgage-bond, as being the property mortgaged, consisted of property belonging to and in the possession of the Defendant Musammat Taj Begam. But a clause was inserted in the mortgage-bond to the effect that after the partition should have been effected the property awarded to that Defendant in that partition should be substituted for the scheduled properties. It is admitted that the effect of this clause would be to quadruple the amount of property mortgaged. The Judge of first instance finds that there is no evidence that this was properly explained to Musammat Taj Begam, but holds that this does not invalidate the execution, because in his opinion the clause would be inoperative. Their Lordships are unable to agree with

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this opinion. The clause is clear in its language, and if the mortgage-bond had been valid would have subjected the whole of the lady's share to the mortgage. The High Court also finds that the Plaintiffs have not shown that this clause was properly explained to the lady, and their Lordships entirely concur in its finding.

It follows therefore that as against the present Appellants it must be taken that the terms of the mortgage-bond were extortionate and that the lady, the mortgagor, did not understand the effect of the deed by reason of its not having been adequately explained to her. The deed is therefore void and cannot be enforced against her.

The Judge at the trial who decided in favour of the deed (subject to alteration in respect of the rate of interest) appears to have been influenced by the consideration that the relatives of the lady must have been aware of the transaction, because her brother was a co-signatory of the deed, and two of her relatives were the identifying witnesses. Apart from the question of the sufficiency of such a consideration their Lordships are of opinion that the facts of the case entirely destroy any inference that the relatives of the lady were acting as a protection to her in the transaction. Her brother was personally interested in carrying through the transaction, because by it he obtained the discharge of debts for which he alone was primarily liable, and this relief was obtained by mortgaging property in which he had no interest. With regard to the other relatives it is clear that the family generally were taking gross advantage of the unprotected state of this *purdanashin* lady. She had been betrothed but the relations would not give consent to her marriage unless she surrendered the whole of her share in the family property. Their Lordships can only express their great surprise that under these circumstances the relatives should have been regarded by the Trial Judge as defenders of the lady's interests.

This point is sufficient to decide the case, it is not necessary to refer to other points raised in the proceedings.

Their Lordships will therefore humbly advise His Majesty that these appeals should be dismissed with costs.

Solicitors: *Messrs. Barrow, Rogers and Nevill*, for the Appellants.

Solicitors: *Mr. D. Grant*, for the Respondents.

B. D. *Appeal dismissed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 257 OF 1911.

CHITTY, J.
1914,
13, July.

CO-OPERATIVE HINDUSTHAN BANK, LIMITED,
v.
BHOLA NATH BOROOAH.

Code of Civil Procedure (Act V of 1908), Sch. II, r. 3, 8 and 15—Arbitration—Order of reference authorising arbitrator to extend time made by consent of parties—Arbitrator extending time after the period originally fixed by Court had expired—Arbitrator after such time, if functus officio—Award submitted within such extended time, if must be set aside—Arbitrator's interest in subject-matter in suit, when insignificant and unknown to him, if would invalidate award

Where an order of reference to an arbitrator under Sch. II of the Code of Civil Procedure (Act V of 1908) fixed three months' time for the submission of the award to Court and also empowered the arbitrator to extend the time for such submission from time to time by endorsement in the office copy of the order:

Held—*That when the Court had made the order by consent of the parties, there could be no objection to the functions of*

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the Court with regard to the enlargement of time being delegated to the arbitrator if the parties so desired.

But the arbitrator can only extend the time in such cases, before the time originally fixed for making the award had expired. If he did not do so, he was by reason of effluxion of time functus officio *and had no further jurisdiction in the matter. As in this case the arbitrator had extended the time after the three months originally fixed by Court had expired, the award must be set aside, although it was submitted within the time so extended by the arbitrator.*

If an arbitrator, unknown to one of the parties, has a personal interest in the subject-matter of the award, it would be improper that he should act as arbitrator. If, however, his interest is insignificant and unknown to himself so that it is impossible that it could have influenced his award in any way, the Court would not be disposed to set aside the award.

This suit was referred by consent of the parties by Mr. Justice Fletcher, sitting on the Original Side of the High Court, under the provisions of Sch. II of the Code of Civil Procedure (Act V of 1908) to the arbitration of Babu Jogendra Nath Mukherjee, a Vakil of the Calcutta High Court, on the 21st of July 1913. The material portion of the order of reference was as follows :—

"That all matters in difference in this suit between the parties hereto be referred to the final decision of Babu Jogendra Nath Mukherjee, Vakil of this Court, who is to make his award in writing and submit the same to this Court together with all proceedings, depositions and exhibits before him within three months from date on which an office copy of this order of reference shall be delivered to him or within such further time as the arbitrator shall allow himself by endorsement on the office copy of the order." The arbitrator submitted his award to the Court on the 1st of June 1914.

The Defendant thereupon applied to the Court for setting aside the award, on amongst other, the following grounds :—

That the provision for extension of time by the arbitrator by endorsement on the order aforesaid is not justified by the provisions of the Code of Civil Procedure and that the said order is without jurisdiction.

That the order of reference was served on the arbitrator on the 18th of August 1913, but neither the Petitioner, nor his solicitor or counsel was aware when the order was actually served on the arbitrator, as the arbitrator had not drawn their attention to this fact in the course of proceedings before him.

That the arbitrator commenced the proceedings on the 23rd of August 1913 and went on from time to time till the 15th of November, when the same was adjourned to the 22nd of November 1913.

That there were sittings on the 22nd and 23rd of November and that the Petitioner's counsel and solicitor attended these under a misapprehension that the time had not then expired.

That at the sitting of the 28th of February which followed, the arbitrator mentioned to the Petitioner's counsel that the three months' time fixed by the order of the Court had expired, and that he had not extended the time as he believed that it was understood that he would go on.

That the counsel for the Petitioner thereupon took exception to the portion of the Court's order relating to the extension of the time by the arbitrator and pointed out to him that under Sch. II, Arts. 3 (1) and 8 of the Code of Civil Procedure, the Court

alone could extend the time and that if the arbitrator extended the time then without reference to Court, he must take the responsibility of the course upon himself.

That thereafter the arbitrator intimated to the parties that he would extend the time to the 31st of May 1914 (which was a Sunday) and that the Petitioner (until the award was filed in Court on the 1st of June and that even then he) did not know when the order extending the time had been endorsed by the arbitrator on the office copy of the order as he did not give any date of the endorsement. That the Petitioner had also discovered since the submission of the award that the arbitrator was a shareholder in the Plaintiff Bank and that for this as also other reasons aforesaid the award should be set aside.

Messrs. B. Chakravarti, S. P. Sinha, J. Chaudhuri and *B. K. Lahiri* for the Defendant Petitioner.

Mr. H. D. Bose for the Plaintiff Bank.

Mr. B. Chakravarti for the Petitioner urged that after the three months originally fixed by the Court, the arbitrator had become *functus officio* and he had no authority to extend the time. The provision in the order of reference which purported to empower the arbitrator to enlarge the time by endorsement in the office copy of the order must have been embodied in it, under a misapprehension that the reference was made under the Indian Arbitration Act (IX of 1899) which empowers the arbitrator to extend the time from time to time by such endorsement. See Sch. I, r. 3, of the Act. But this was a reference under the Code of Civil Procedure, Sch. II. The Code expressly provides that the "Court shall specify the time" for making the award. See Sch. II, r. 3, Civil Procedure Code. Then Sch. II, r. 8, provides that it is the Court that can enlarge the period, "from time to time either before or after the expiration of the period fixed for the making of the award." This was pointed out by Mr. J. Chaudhuri to the arbitrator before whom he appeared. But the arbitrator did not care to come before Court and apply for extension of time. He had committed other irregularities set out in our petition. If he had come before Court, then we could have brought these to the notice of Court and asked to annul the proceedings and make a fresh reference. The fact that Mr. Chaudhuri continued to appear before the arbitrator after he had drawn the attention of the arbitrator to the provisions of the law and asked the arbitrator to proceed on his own responsibility cannot amount to acquiescence on Mr. Chaudhuri's part. In such cases it is enough if the counsel protests, and he is not bound to retire from the case. See *Hamlyn* v. *Betteley* (1). Further, in this case it was not known to the Petitioner, when the arbitrator extended the time, as he did not put down any date above or below his endorsement extending the time. One thing is certain that, he did not extend the time within the three months originally fixed by the Court. The power given to the arbitrator to extend time amounted to delegation of the Court's powers and was without jurisdiction. Even assuming, but not admitting, that the provision in the order of reference empowering the arbitrator to extend the time was good in law, still the arbitrator did not extend the time before the three months fixed by Court had expired. He was then *functus officio* and he had in any view no authority to extend the time. But he could have come before Court at any time before submitting the award and applied to Court to have the time

(1) L. R. 6 Q. B. D. 63 at p. 65 (1880).

extended under Sch. II, r. 8, Civil Procedure Code. Mr. Chaudhuri was therefore fully justified in attending before him even after the time had expired. The Court had no jurisdiction to extend the time after the award had been submitted to Court. This is the view that was taken by the Judicial Committee of the Privy Council in *Har Narain* v. *Bhagwant* (2). This has been followed in our Court, even after the Code of Civil Procedure of 1908 came into force. See *Shib Krishna* v. *Satish Chunder* (3). The wording of Sch. II, r. 15, cl. (c), "after the expiration of the period allowed by Court" read with "no award shall be set aside except on one of the following grounds" shows clearly that this amendment of sec. 521 of the Code of 1882 was made in deference to the Privy Council decision referred to above. Further, the award should be set aside, because the arbitrator never disclosed the fact to the Defendant that he is a share-holder in the Plaintiff Bank. See *Dimes* v. *Grand Junction Canal* (4). In this case the Lord Chancellor's decree was set aside, because he was share-holder in the Plaintiff Company which was not known to the Defendant. In our Court, Maclean, C. J., set aside the award in *Kali Prosunno* v. *Rajani Kant* (5), because the arbitrator had not disclosed that he was the retained pleader of a party. In the course of Mr. Chakravarti's argument the arbitrator was sent for and examined by the Court. The substance of his deposition will appear from the judgment of Chitty, J.

Mr. H. D. Bose urged on behalf of the Plaintiff Bank, that the Privy Council decision relied upon by Mr. Chakravarti had been superseded by the provisions of the Civil Procedure Code of 1908. Referred to Sch. II, r. 15, cl. (c), of the Code of 1908 and sec. 521 of the Code of 1882. The case of *Shib Krishna* v. *Satish Chunder* (3) was therefore wrongly decided. Referred also to sec. 148, Civil Procedure Code, which is a new section and which gave Court an absolute discretion to extend time at any time the Court pleased. The provision in the order of reference empowering the arbitrator to extend time was not bad, but is sanctioned by long-standing practice on the Original Side of the Calcutta High Court. Even if the endorsement extending time was bad after the period fixed by Court had expired, the fact that Defendant's counsel attended the proceedings would operate as estoppel and amount to waiver and acquiescence. See *Tyerman* v. *Smith* (6).

The JUDGMENT OF THE COURT was as follows :—

CHITTY, J.—This is a petition on behalf of the Defendant Bhola Nath Borooah that the award made in this case by Babu Jogendra Nath Mukherjee, a Vakil of this Court, may be set aside. Two grounds have been urged in support of this application—(1) that the award was made out of time and (2) that Babu Jogendra Nath Mukherjee is a share-holder in the Plaintiff Company and therefore ought not to have acted as arbitrator between the parties. The suit was filed on 9th March 1911, to recover Rs. 25,000 on five hundis said to be signed on behalf of the Defendant's firm by the Defendant's son, and endorsed over to the Plaintiff Bank by Rajendra Chandra Chuckerbutty. The Defendant filed his written statement on

(2) L. R. 18 I. A. 55: s. c. I. L. R. 13 All 300 (1891).
(3) I. L. R. 38 Cal. 522 (1911).
(4) 3 H. L. C. 759: s. c. 88 R. R. 330 (185).
(5) I. L. R. 25 Cal. 141 at pp. 143, 144 (1897).

(3) I. L. R. 38 Cal. 522 (1911).
(6) 25 L. J. Q. B.

1st May 1911, pleading payment of Rs. 15,000. On the 9th July 1912, there was a reference to the arbitration of Babu Tara Kissore Chaudhuri, a Vakil of this Court. Nothing further was done under that order, and on the 21st July 1913 that order was discharged; and a fresh order of reference was made to Babu Jogendra Nath Mukherjee. Under that order his award was to be made within three months from the date of the service of an office copy of the order upon him or within such further time as the said arbitrator might allow himself by endorsement on the said office copy of the order. The order was served on 18th August 1913. The three months would expire, therefore, on 18th November 1913. It is admitted that no award was made, nor the time extended, within that date. The arbitrator however proceeded with the reference and held a number of meetings. On 28th February 1914, it was brought to his notice that the time had expired and had not been extended. I have had the advantage of hearing the evidence of the arbitrator as to what precisely occurred. From his evidence it is clear that on 28th February 1914, there was a discussion with regard to the confirmation of the arbitration. The arbitrator wanted to know if any objections would be taken; and pointed out to counsel on either side that there might be a difficulty, and that, in case the award went against either party, that party might make a grievance of it. The Plaintiff's counsel appears to have made no objection to the arbitration continuing. The Defendant's counsel on the other hand said, that he would not commit himself, but left the responsibility of proceeding entirely with the arbitrator. Shortly afterwards the arbitrator made an endorsement on the office copy extending the time for making the award to 31st May 1914. On 31st May, he made and signed his award. There are three additions or alterations in it, two merely verbal, but one of more importance, relating to the costs of the arbitration. Whether he made these alterations on the night of the 31st or early in the morning of the 1st June is not clear. The award is dated 31st May and was filed by him on 1st June 1914. The Defendant against whom the award was made now complains that the arbitrator had no authority to extend the time after 18th November 1913. This contention is, I think, correct. It was suggested that the order of this Court, dated 21st July 1913, was *ultra vires* in so far as it permitted the arbitrator to enlarge the time for making his award. I do not think that is so. The Court proceeded by consent of the parties and there could be no objection to the functions of the Court with regard to the enlargement of time being delegated to the arbitrator if the parties so desired. It is however clear that the arbitrator would only have such power as was conferred by the order, and he would therefore be bound to enlarge the time before the time originally fixed for making the award had expired. If he did not do so, he was by reason of effluxion of time *functus officio* and had no further jurisdiction in the matter. It is a matter of great regret that when this difficulty was first noticed, and there was a discussion with regard to it before the arbitrator, an application was not made then and there to the Court under Schedule II, para. 8, of the Code of Civil Procedure, in which case the Court could have enlarged the time, even though the time fixed for making the award had expired. This was not done, presumably because the parties were willing to go on with the reference. I think, that on the above ground the award is invalid and must be set aside.

The second ground is that Babu Jogendra Nath Mukherjee was, unknown to the Defendant, a share-holder in the Plaintiff company. It appears from Babu Jogendra Nath Mukherjee's evidence that it was also unknown to himself. He had, it appears, applied for one share of Rs. 50, but he says he never paid a pice in respect of it and was unaware until yesterday whether any share had been allotted to him or that his name was on the Register of shareholders. It was stated at the Bar that on this share Rs. 5 had been paid. With regard to this Babu Jogendra Nath Mukherjee stated that he had paid nothing, but that some friend must have paid on his behalf. Now it is clear that if an arbitrator, unknown to one of the parties, has a personal interest in the subject-matter of the award, it would be improper that he should act as arbitrator, as the fact of his having such an interest might influence his decision. But in this case, as his interest was so small and was apparently unknown even to himself, it is impossible that it could have influenced his award in any way. If that were the only ground, I should have been unwilling to set aside the award merely because he held that one share. On the first ground, however, the award must be set aside, and I accordingly order that, that be done. It appears to me that both the parties were willing to go on with the arbitration, even when they had been made aware of this difficulty. Under the circumstances, I direct that, each party do bear their own costs of this application. I think that the suit should proceed before me with all expedition as it has now been for three years on the file. The case will be set down for hearing four weeks from to-day, the written statement to be filed within a fortnight.

Messrs. S. D. Dutt & Ghosh, Solicitors for the Petitioner.

Mr. N. C. Bose, Solicitor for the Opposite Party.

Award set aside.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE
No. 12 OF 1910.

COXE, J.
IMAM, J.
1914,
Heard, 26, March,
2, 3 & 6, April.
Judgment,
8, April.

BHAIRO PROSAD and another, Defendants, Appellants,
v.
GOJADHAR PROSAD SAHU & ors., Plaintiffs, Respondents.

Suit on hatchitta—*Suit on account stated—Alteration of suit on account stated to suit on account stated in previous year when account stated found to be forgery—Limitation Act (IX of 1908), sec 19—Acknowledgment of debt.*

The Plaintiffs sued to recover the principal and interest due on a certain hatchitta. *The Plaintiffs alleged that they were the proprietors of a joint bank, that the father of the Defendants used to borrow money on* hatchittas *from their bank, that accounts were adjusted up to 1308 and the father of the Defendants signed the* hatchitta *for 1308 on which the suit was brought. The lower Court found this* hatchitta *to be a forgery, but gave the Plaintiffs a decree on the* hatchitta *for 1307 :*

Held—*That the suit being on an account stated and not on an open account and the account stated, sued on, being found to be a forgery, the suit could not be altered to one on an account stated in a previous year. In any case it ought not to have been done with retrospective effect.*

A letter to the effect that the writer "after looking into the account will sign it" is not an acknowledgment of liability on an account stated within the meaning of sec. 19 of the Limitation Act.

This was an appeal preferred on the 5th

BHAIRO PROSAD *v.* GOJADHAR PROSAD SAHU.

January 1910 against a decree of Babu Pankaja Kumar Chatterjee, Sub-Judge of Muzaffarpur, dated 1st December 1909.

The appeal arose out of a suit to recover the principal and interest due on a certain *hatchitta* and on bank books.

The Plaintiffs alleged that they were the proprietors of a joint bank, that Ram Manohar Sahu, who was the father of the present Defendants, used to borrow money on *hatchittas* from their bank, that accounts were adjusted up to Assin 24, 1308, and Ram Manohar Sahu signed the *hatchitta* for 1308 on October 6, 1903; that Rs. 4,490-3-9 pies was then due from him, that he and the Plaintiffs jointly bore the expenses of a certain temple, that the bank used to advance his portion of the temple expenses too and that up to the date of suit Rs. 6,062-3-0 was found from him on all heads and that as his sons were benefited by the loans, they were also jointly liable with their father for the sum now sought to be recovered.

The suit was at first dismissed on certain technical grounds, but in appeal the High Court directed that the plaint should be returned for amendment under sec. 53, Civil Procedure Code (1882); when the suit was sent back, the plaint was amended and refiled.

The material portion of the plaint is set out below :—

"That the Plaintiffs have a joint banking firm carrying on monetary transactions from the time of their ancestors, within the jurisdiction of this Court.

*   *   *   *

"That the Defendant No. 1 (the father of the other Defendants who died during the pendency of the suit) has been carrying on for a long time for necessary expenses of his joint family monetary transactions with the joint banking firm of the Plaintiffs under *bahi-khata* and hand-notes signed by him in his own right and as father and head member of the joint family of Defendants Nos. 2 and 3, and he prepared one *hatchitta* and gave it to the Plaintiffs' banking firm, and a similar *hatchitta* was prepared by the Plaintiffs' firm and given to the Defendant; and the Defendant signed the said *hatchitta* every year after thoroughly understanding its contents.

"That all sums which the Defendant drew from the Plaintiffs' banking firm and paid thereto have all along been entered in the Plaintiffs' *bahi-khata*, and they were also entered every year in the said *hatchitta*; and the Defendant signed the entry of balance due in the said *hatchitta* year by year.

"That a sum of Rs. 4,490-3-9 was found due up to 24th Assin 1308 Fasli from the Defendants to the Plaintiffs; and (Defendant No. 1) after thoroughly understanding the contents of the *hatchitta* aforesaid affixed his signature to the entry of the balance due by him.

"That a sum of Rs. 6,062-3-0 is due up to this date under the *bahi-khata* and *hatchitta* aforesaid from Defendants to Plaintiffs on account of principal with interest and compound interest at 12 annas per cent. per mensem in accordance with the practice prevailing in banking business; for this amount, this suit is brought.

"That the Defendant No. 1, the father, and Defendants Nos. 2 and 3, his sons, are joint in family and mess; and the Defendant No. 1 conducts all business and affairs of the joint family for the benefit of the members of the joint family, on behalf of the Defendants Nos. 2 and 3; and all the members of the family were benefited from the amounts which were drawn from the Plaintiffs' firm; for this reason and with a view to obviate future objections

this suit is instituted by impleading as Defendants the Defendants Nos. 2 and 3.

* * * *

"The cause of action accrued within the jurisdiction of this Court on the 6th October 1903, the date on which the accounts containing entries of the amount due in 1308 up to the 24th Assin, the end of the Mahajani year, were signed (amended by order of the 8th December 1908), that being the last signature contained in the said *hatchitta*."

The defence *inter alia* was that the *hatchitta* produced by the Plaintiffs was a fabrication; the Defendants also pleaded limitation.

The Subordinate Judge found the *hatchitta* of 1308 to be a forgery but decreed the suit on the *hatchitta* of 1307 which the Subordinate Judge found had admittedly been signed by Ram Manohar.

On the question of limitation, the Subordinate Judge relying on the letter set out below found in favour of the Plaintiffs.

(Ex. 4C).

"To—Mr. W. P. Smith, Manager of the joint Kothi of Babu Baldeo Pershad Sahu and others.

"After greetings, I desire your welfare.

"As your letters of the 21st September 1902 and 27th idem have been received (*sic*). As regards what you have written about the items relating to dealings under *hatchitta* with the joint Kothi of Babu Baldeo Pershad and others, to the effect that it will be barred by limitation on the 12th October 1902, I have to say that it is some time since in answer to your letter I called for the account only, stating that I would after looking into the account sign it. Please kindly favour me after reading this letter with the account. I will sign it after looking into the account. Had the account been received by me, the matter of signing would have ere this been finished. Kindly send the account with the *hatchitta* to me; I will after looking into the account sign it. I have before written an answer with regard to other matters and I will write about them hereafter. You will kindly inform me of good health.

Yours respectfully,

Babu Manohar Lal Sahu.

From Muzaffarpur,

dated the 29th September 1902".

Dr. Ghosh, Babus Baldeo Narain Singh and *Joytish Chandra Sarkar* for the Appellants.

Babus Mohendra Nath Roy, Lakshmi Narain Singh and *Kulwant Sahay* for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

COXE, J.—This appeal arises out of a suit on a *hatchitta*, instituted on the 10th November 1904. The suit was dismissed on some preliminary point, but was remanded by the Court for trial on the merits. The learned Subordinate Judge has disbelieved the *hatchitta*, but has given the Plaintiffs a decree on the *hatchitta* of the previous year, and holds that the suit is saved from limitation by reason of certain acknowledgments.

The learned pleader for the Respondents has attempted to support the decision of the Court below by contending that the *hatchitta* sued upon, *i.e.*, the *hatchitta* of 1308 ought to be believed. This contention however is quite unsustainable. As the plaint originally stood, the cause of action was stated to have arisen on the 21st October 1901, the date of the last signature entered in the *hatchitta*. The sentence is very ungrammatical, but that is the meaning that any plain man would attach to the passage. It was not till four years later, after the suit had been remanded for

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re-hearing, that the Plaintiffs realised that the suit was barred by limitation, and they then amended the plaint by altering the date of signature to October 1903. Obviously an alteration made more or less under compulsion four years late must excite suspicion, and this is enhanced by the fact that Mr. Hindmarsh who verified the original plaint gives no explanation why the wrong date was entered. He says indeed that he satisfied himself that the allegations in the plaint were true. He does not depose that the *hatchitta* was signed in 1903. All that he can say is that, as far as he recollects, the accounts were adjusted during his managership, which began in September 1903. But, as prior to being manager, he had been receiver of the Plaintiffs' firm, his recollection five years after the institution of the suit may well have been uncertain, and does not outweigh his sworn verification in 1904. Several letters are put in, but none of them refer to the *hatchitta* of 1908, and the only evidence that the *hatchitta* was signed about October 1903 is the bare word of the Plaintiff's *gomastha*. This is corroborated to some extent by a statement of Mr. Smith, that after September 1902, the Defendant asked that the account of 1308 might be left open. Copies of two lists are put in, dated the 28th September 1903 and the 9th October 1903. The first shows that the Defendant had not then signed the *chitta* for 1308, and the second shows that in the meanwhile he had done so. These lists might have been good evidence, but they are not really proved at all. The originals were filed, but were taken back and are then said to have been lost. They are not put to Mr. Hindmarsh at all, and certainly in the circumstances of the case no value whatever can be attached to copies.

Another fatal defect in the Plaintiffs' case is that although the Subordinate Judge has come to a clear finding against them that the *hatchitta* sued upon is a forgery, and although they have tried to support his decree in their favour by contending that this part of the decision is wrong, they do not produce the *hatchitta* that has been removed by them from the record, and although this appeal was instituted in January 1910, has not been returned. The Subordinate Judge says—"The test of handwriting also shows in no indecisive manner, that Ram Manohor Sahu could not have signed the *hatchitta* for 1308 after accounts were adjusted and the balance struck. He admittedly signed the *hatchitta* for 1307 (see Ex. 3A). If his admitted signature and writing be compared with his so-called signature and writing on the receipt stamp for 1308, it will be abundantly clear that they could not have been written by one and the same hand." To ask us to reserve this finding, while the *hatchitta* is withheld, seems to me idle.

I therefore hold that these materials are quite insufficient to justify any interference with the Subordinate Judge's finding that the *hatchitta* in suit was not genuine.

The learned Subordinate Judge however has given the Plaintiffs a decree on the *hatchitta* of 1307. This he says was signed admittedly on the 24th Assin 1308. I cannot trace the admission, but the witness Radha Kishen deposes that it was signed about a week before the Dasserah day in 1309, and that would be more than three years before suit. The Judge however holds that limitation is saved by the letter (Ex. 4C), which he regards as an acknowledgment under sec. 19 of the Limitation Act. The letter is dated the 29th September 1902.

I do not think that this decision can be maintained. The suit was brought on an

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account stated and not on an open account. It was found that the account stated was a forgery. I do not think that in these circumstances the suit could be altered to one on the account stated in the previous year. In any case, it ought not to have been done with retrospective effect. The plaint ought to have been amended, and then there could have been no question that the suit was barred by time. Nor do I think that the letter (Ex. 4C) is an acknowledgment under sec. 19 of the Limitation Act. In the first place, the letter relates to a *hatchitta* that "will be barred by limitation on the 12th October 1902". That cannot possibly be the *hatchitta* of 1307. Next, the letter merely says that the writer after looking into the account will sign it. That is not in my opinion an acknowledgment of liability on an account stated. The Judge relies on the case of *Moniram Dutt* v. *Seth Rupchand* (1). That was not a suit on an account stated, but a suit on an open and unsettled account between the parties. And the letter (Ex. 4C), assuming that it is an acknowledgment of liability to pay whatever may be found due when accounts have been properly taken between the parties, is certainly not an acknowledgment of liability to pay the amount stated to be due in the *hatchitta* of 1307. In this connection, reference has been made to the case of *Andrappa Chetty* v. *Dvaragulu Naidu* (2) which is clearly in point.

In my opinion the suit ought not to have been altered to one on the *hatchitta* of 1307, and, even if so altered, it is barred by time. I would decree the appeal, and dismiss the suit with costs throughout.

IMAM, J.—I agree.

Appeal allowed.

(1) I. L. R. 33 Cal. 1047 (1906).
(2) I. L. Mad. 68 (1911).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 193 OF 1911.

N. R. CHATTERJEA, J.
WALMSLEY, J.
1913,
Heard, 29 and 30, April.
Judgment, 6, May.

LUCHMI MISSIR, Defendant, Appellant,
v.
DEOKI KUAR, Plaintiff, Respondent.

*Rent—Adjustment of account between landlord and tenant—*Wasil-baki*—Portion of amount due on adjustment, kept in deposit with tenant for payment to superior landlord—Such amount if continues to be rent and if recoverable as such—Limitation Act (IX of 1908), Sch. I, Art. 115.*

The Plaintiff was the landlord and the Defendant the tenant. There was an adjustment of accounts between them as regards rent in 1312 F.S., the adjustment being embodied in a wasil-baki, *and the Defendant was found liable to pay a certain amount out of which Rs. 136-2 was left with the Defendant as a deposit for payment to the superior landlord on account of rent payable by the Plaintiff to the latter and the balance was stated as payable to the Plaintiff. The Defendant did not make the payment to the superior landlord who sued the Plaintiff and obtained a decree against him for the amount due from him. The Plaintiff thereupon sued the Defendant to recover the rent for the years 1313 to 1315 and the amount which he had to pay to the superior landlord with interest:*

Held—*That the* wasil-baki *showing that the amount which was to be paid to the superior landlord was left in deposit with the Defendant, it must be held that, there was a discharge for this portion of the rent. The assignee was no party to the contract but if, as the contract showed, the amount was left in deposit with the Defendant for payment to a third party and it amounted to a discharge so far as that*

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portion of the rent was concerned, the amount so kept in deposit ceased to be rent and recoverable as such and Article 115 of the Limitation Act was applicable to the case.

This was an appeal preferred on the 3rd February 1911, against a decree of Babu Bejoy Gopal Basu, Sub-Judge of Zilla Patna, dated 23rd August 1910, reversing a decree of Babu Raj Kishore Ray, Munsif of Bihar, dated 1st December 1909.

The material facts of the case will appear from the judgment.

Babu Karunamoy Bose for the Appellant.

Babu Ganesh Dutt Singh for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The Defendant-Appellant is the tenant of the Plaintiff-Respondent. There was an adjustment of accounts between them as regards rent on the 26th Agrahayan, 1312 F.S., corresponding to the 18th December 1904. This adjustment of account is embodied in a *wasil-baki*, and it appears that the Defendant was found liable for Rs. 158-14-3 on account of rent for the years 1309 to 1312 F.S., out of which Rs. 136-2 was left with the Defendant as a deposit for payment to the superior landlord on account of rent payable by the Plaintiff to the latter for the years 1309 to 1312 and the balance, *viz.*, Rs. 22-12-3 was stated as payable to the Plaintiff. The Defendant did not pay the said sum of Rs. 136-2 to the superior landlord and the latter sued the Plaintiff and obtained a decree for Rs. 225 which was realised from her on the 28th January 1907. The Plaintiff thereupon brought the present suit to recover the sum of Rs. 599-2-3 from the Defendant on account of rent for the years 1313 to 1315 and the amount which she had to pay to the superior landlord with interest. There is no dispute as to the rent for the years 1313 to 1315 in this appeal. As regards the claim for the amount which the Plaintiff had to pay to the superior landlord, the defence is that the claim should be considered as one for rent and that it was barred by limitation and that the Plaintiff alone had no right to sue for the amount, the *wasil-baki* being in favour of the Plaintiff and her mother-in-law who was not joined as a party to the suit. The Court of the first instance decreed the suit in part on account of rent for the years 1313 to 1315 and held that the other portion of the claim was barred by limitation. That decree was confirmed on appeal, but, on review, the lower Appellate Court held that the claim was not barred by limitation except as to the Rs. 22-8, and gave a decree accordingly to the Plaintiff. The Defendant has appealed to this Court. It has been contended on his behalf that the amount which was assigned by the Plaintiff for payment to the superior landlord was part of the rent and the claim for recovery of the said amount must be considered as one for rent and not for damages, and reliance is placed upon the Full Bench case of *Basanta Kumari* v. *Ashutosh* (1). In that case it was held upon a construction of the lease that the money which the tenant agreed to pay to the superior landlord, by assignment of his landlord was rent and recoverable as such and that it did not cease to be rent by reason of the so-called assignment—an assignment to which the assignee was not a party and which was not accepted by him. Macpherson, J., in delivering his judgment (with which the majority of the learned Judges agreed) said, "the money was undoubtedly a part of the

(1) I. L. R. 27 Cal. 67 (1899).

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entire sum which the Defendant undertook to pay the Plaintiff, his landlord, as rent for the use of the land. According to the terms of his lease he was to pay this money on the landlord's account to certain persons who were the Plaintiff's landlords. He was to take from them receipts in the Plaintiff's name for the money so paid, and at the end of the year he was to produce those receipts and take from the Plaintiff a receipt for the entire sum of the rent inclusive of the balance which he was to pay to the Plaintiff direct. This, I think, clearly shows that in the contemplation of the parties the money did not cease to be a part of the rent or recoverable as such. If the Defendant defaulted to pay the money in the way agreed on between himself and his landlord, the assignee had no cause of action against him and the Plaintiff never in any way lost or waived his right to recover the money which was not so paid as a part of rent. In fact, there was to be no discharge of the rent unless and until the Defendant produced the receipts for the payments which he undertook to make."

The determination of the matter depends upon the terms of the contract in each case. In the present case the *wasil-baki* shows that Rs. 136-2 which was to be paid to the superior landlord was left in deposit with the Defendant, and we think that the lower Appellate Court was right in holding that there was a discharge for this portion of the rent. It is true, the assignee was no party to the contract, but if, as the contract shows, the amount was left in deposit with the Defendant for payment to a third party and it amounted to a discharge, so far as that portion of the rent was concerned, we think it ceased to be rent and recoverable as such. The case, therefore, does not **fall within the principle laid down by the** Full Bench in *Basanta Kumari's* case (1), but would fall within the principle of the case of *Hemendra Nath* v. *Kumar Nath* (2). But as we have said, each case must depend upon the terms of the particular contract, and it seems to us, having regard to the terms of the contract contained in the *wasil-baki*, that the amount left in deposit with the Defendant ceased to be part of the rent. We are accordingly of opinion that the claim for recovery of the amount which the Plaintiff had [illegible] to pay to the superior landlord is one for damages and not for rent, and we agree with the lower Court upon this point. We also agree with that Court in holding that Art. 115 of the Limitation Act is applicable to the case. That article provides that the period of limitation, in a suit for compensation for the breach of any contract, express or implied, not in writing, registered and not herein "specially provided for", is three years from the time when the contract is broken. It has not been found, however, by the Court below when the contract was broken. The Court below held that the Plaintiff was within time, as she came within three years from the date when the plaint was filed against her by her landlord on account of non-payment of the money by the Defendant, *i.e.*, on the 9th June 1906. So that it assumed that, that was the date on which the contract was broken. It has been contended on behalf of the Appellant that the money having been left with the Defendant for payment to the superior landlord on account of the rent due by the Plaintiff to the latter for the years 1309 to 1312, the Plaintiff must have intended that the money was to be paid by the Defendant to the superior landlord at once, at any rate, at the end of the agricultural year, and the agricultural year

(1) I. L. R. 27 Cal. 67 (1899).
(2) I. L. R. 32 Cal. 169 (1904).

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1312 having come to an end in September 1905, the contract must be deemed to have been broken in September 1905, which was more than three years before the suit was instituted and that, at any rate, as no time was fixed for the performance of the contract, it ought to have been performed within a reasonable time. It has been contended on the other hand, on behalf of the Respondent, that the Defendant could have paid the rent to the superior landlord even after the end of the agricultural year 1312, or at any time before the suit for rent was brought by the superior landlord against the Plaintiff and that the contract must be taken to have been broken when the superior landlord instituted the suit for rent against the Plaintiff. Under sec. 46 of the Indian Contract Act, where by the contract a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time, and under that section "what is a reasonable time" is in each particular case a question of fact. We think, therefore, that the case ought to go back to the lower Appellate Court for a finding as to when the parties intended the contract to be performed. If it was intended by the parties, that the contract was to be performed at any time before the superior landlord instituted the suit for rent against the Plaintiff, then the contract must be taken to have been broken when that suit was instituted, and in that case the suit is not barred by limitation. If, on the other hand, the parties intended that the money kept in deposit with the Defendant was to be paid by him to the superior landlord at the end of the agricultural year 1312, or within a reasonable time from the date on which the contract was entered into, the Court will have to find whether the time was within three years of the date of the institution of the suit. The Court will come to a finding upon this point upon a consideration of the contract, as well as all the circumstances of the case, and dispose of the appeal accordingly. The next question is, whether the suit can be maintained by the Plaintiff. The *wasil-baki* was no doubt in favour of the Plaintiff and her mother-in-law, and the superior landlord brought the suit for rent both against the Plaintiff and her mother-in-law. It has, however, been found by the Munsif as well as by the learned Sub-Judge, who heard the appeal originally, that the Plaintiff's mother-in-law had no right to the holding in respect of which the *wasil-baki* account was made, as the holding belonged to the Plaintiff's husband and the Plaintiff alone was her heiress. But that by itself would not be a sufficient answer to the objection raised on behalf of the Defendant, because the contract in question is a contract with respect to certain sum of money and does not deal with the holding itself. The question, however, does not appear to have been raised before the learned Subordinate Judge who heard the appeal on review. It is open to the Defendant to waive non-joinder of one of the joint promisees, and it may be that having regard to the fact that both the Courts below found the question against the Defendant, he waived the question of non-joinder at the hearing of the appeal after review. Under these circumstances we decline to entertain the objection at this stage of the case. The result is that so far as the claim for rent of years 1313 to 1315, and the claim for Rs. 22-8, *i.e.*, the amount shown as balance due by the Defendant in the *wasil-baki* are concerned, the decree of the lower Appellate Court will stand confirmed with proportionate costs, and that the decree, in so far as the

claim for the amount the Plaintiff had to pay to her landlord is concerned, is set aside and the case sent back to the Court of Appeal below to be dealt with according to the directions given above and for disposal according to law. Costs to abide the result.

Case remanded.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 58 OF 1913.

D. CHATTERJEE, J.	MUSSTT. CHANDRABATI, Decree-holder,
WALMSLEY, J.	Appellant,
1914,	v.
Heard, 3 and 6, July.	MADHO PROSAD,
Judgment, 8, July.	Judgment-debtor, Respondent.

Civil Procedure Code (Act XIV of 1882), sec 602—Surety for costs of Privy Council Appeal—Decree for costs in Privy Council if may be executed against properties charged by surety—Personal execution—Civil Procedure Code (Act V of 1908), Or. 34, r. 14—Transfer of Property Act (IV of 1882), secs. 67, 99.

Under sec. 145 of the Civil Procedure Code, a party who has obtained a decree for costs in Privy Council can proceed by application to realise the amount of costs decreed against the surety (for the judgment-debtor) personally, but not against the property which he had charged under sec. 602 of the old Civil Procedure Code.

Even under Or. 34, r. 14, of the Civil Procedure Code, which has replaced sec. 99 of the Transfer of Property Act, the properties charged cannot be sold except by instituting a mortgage suit.

This was an appeal preferred on the 14th February 1913 against an order of E. G. Drake-Brockman, Esq., District Judge of Zilla Bhagalpur, dated the 15th November 1912.

The material facts will appear from the judgment.

Babu Kulwant Sahay for the Appellant.

Babu Jogesh Chandra Ray and *Moulvi Khurshed Hossain* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The Appellant obtained a decree for costs in the Privy Council and she applied for the execution of the said decree against the surety and the properties he had charged as security given under sec. 602 of the old Civil Procedure Code. It was objected that she could not realise the security without a suit under sec. 67 of the Transfer of Property Act. In support of this contention of the Respondent reliance was placed on the judgment of this Court in *Tokhan Singh* v. *Girwar Singh* (1). The Court below gave effetct to this contention and hence this appeal.

It is argued that *Tokhan Singh's* case (1) was decided under sec. 99 of the Transfer of Property Act which is no longer law, and Order 34, rule 14, of the present Civil Procedure Code of 1908, which stands in its place, is not applicable to the present case. Sec. 99 of the Transfer of Property Act provided that where a mortgagee in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under sec. 67, etc. Order 34, rule 14, is "where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under a mortgage, he shall not be entitled to bring the mortgaged property to sale, etc."

The main alteration seems to be the deletion of the words "or not", and the prohibition now applies only to cases of decrees

(1) I. L. R. 32 Cal. 494 (1905).

for payment of money in satisfaction of a claim arising under the mortgage. The question therefore is whether the decree of the Appellants is one within the meaning of this rule. The decree is not against the surety. The claim against him is based entirely on the security-bond which creates the mortgage. The claim against the security is a claim arising under the mortgage, and if the decree obtained by the Appellant can be treated as a decree for the payment of money in satisfaction of such a claim, the rule does apply and the mortgaged property cannot be sold except under a decree under sec. 67 of the Transfer of Property Act. If it is not such a decree, still the mortgaged property cannot be sold as such without a decree in a suit under sec. 67 of the Transfer of Property Act. So far as this point is concerned, the reason seems to be that the equity of redemption may have been dealt with in the meantime, and it would lead to multiplicity of suits and other loss to the mortgagor to sell the property subject to unascertained claims.

It is contended however that the Appellant can realise the personal security under sec. 145 of the Civil Procedure Code. This question would depend upon the construction of the security bond. The bond is in accordance with the rules of the Court and is set out at page 10 of the Paper-book. It sets out that the surety is bound in the sum of Rs. 4,000 to the Appellant and to the Registrar of the Court to be paid to them, etc. It then goes on to say that the said surety shall pay the costs up to Rs. 4,000, and on such payment the bond will become void and in default the mortgaged properties will be sold. We think, that this does create a personal liability, and if the Appellant gives up his rights as mortgagee and does not seek to sell the mortgaged properties as such, he can realise the amount of cost, up to Rs. 4.000, from the person and other properties of the surety. The application made by the Appellant was for recovery of the costs from the person and property of the surety, and so far she was within her rights. She however wanted to sell the mortgaged properties and described them as such and did not expressly indicate her election to abandon her rights as a mortgagee under the security bond. In this view of the case, we think that the order of the lower Court was so far wrong as it did not allow her to proceed as upon a personal bond. The application however was misleading, and we allow the appeal with the qualification stated above, but without costs in either Court The application for execution will proceed subject to the amendments suggested.

Appeal allowed.

CRIMINAL REFERENCE.]

REF. No. 129 OF 1914.

SHARFUDDIN, J. TEUNON, J. 1914, 19, August.	THE EMPEROR *v.* SABER AKUNJI, Accused.

Criminal Procedure Code (Act V of 1898), sec. 337—Formal withdrawal and forfeiture of pardon if necessary before proceeding against approver for original offence.

Under the present Code of Criminal Procedure no formal withdrawal of a pardon and no formal declaration that a pardon has been forfeited are required before proceeding against a person who accepted a conditional pardon but violated the condition thereof.

This was a reference under sec. 438, Cr. P. C., made by Mr. J. H. Street, Sessions Judge of Khulna, on the 26th May 1914, recommending that the proceedings taken against the accused by the Deputy Magistrate of Khulna, dated 15th April 1914,

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directing Saber Akunji to take his trial under sec. 395, I. P. C., in the Court of Sessions be quashed for reasons set forth in the reference.

The letter of reference was as follows :—

It is alleged that on the 29th October last, a dacoity was committed in the house of one Madan Mandal at Gandamari, P. S. Batiaghata, in this district. On the 3rd March last, a number of accused were produced before this Court for trial under sec. 395, I. P. C., the case against them resting mainly on the evidence of one Saber Akunji, an approver, who had duly been granted a conditional pardon. His statement on oath in the lower Court appears to have been a full one, but in this Court he resiled from that statement and professed complete ignorance of the dacoity. The case against the accused was therefore withdrawn by the Crown.

Next day, that is, on the 4th March, the said Saber was produced before the officer who granted the pardon by the Police with the prayer that the pardon should be "withdrawn," and on the application I find the order "order in order-sheet." In the order-sheet the accused is simply remanded to hazat. This officer who was Sub-divisional Officer here was then transferred and on the 16th March another Deputy Magistrate passed the order : "the accused will be proceeded against under sec. 395, I. P. C." With reference to this order I have to observe—

(1) That the said officer was not the Sub-divisional Officer at that time (though subsequently so appointed) and it is therefore doubtful whether he can be regarded as the successor in office of the Magistrate who granted the pardon.

(2) That in any case the pardon must be declared forfeited and the grounds for forfeiture must be given before proceedings are taken. The accused was however committed to this Court, and the case came on for hearing yesterday (25th May). Accused was undefended. The jury were sworn and the Public Prosecutor opened the case. At this stage the legal defect was discovered and the Public Prosecutor filed a petition praying for a reference to the High Court. A copy of that petition and of the order of the Court is annexed hereto. The petition sets forth the initial difficulty in the commitment.

I have however to observe that the rulings seem to be conflicting as to the power of the High Court to quash a commitment when the accused has been put on trial and pleaded "not guilty." I have entertained some doubts as to whether the jury should not have been directed to return a verdict, but am of opinion that, if all these proceedings since the 3rd March have been without jurisdiction, they should be treated as nullity. I am further doubtful whether, in a case where there is no application from the side of the accused for quashing of the proceedings and the prolongation thereof is due to carelessness outside his control, the proper procedure would not be for the Crown to enter a *nolle prosequi.* The Public Prosecutor was however instructed not to do so and perhaps no general rule can be laid down to meet circumstances so unusual as these.

I therefore request that these proceedings may be laid before the High Court with the above recommendation.

Babu Atulya Charan Bose for the Crown.

The JUDGMENT OF THE COURT was as follows :—

In this case it appears that one Saber Akunji and a certain number of others were charged with the commission of a dacoity on the 29th of October 1913. Under section 337, Cr. P. C., pardon was

tendered to Saber Akunji and was accepted by him on the usual condition that he should make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence in question. In the Court of the Committing Magistrate it appears that Saber Akunji did make a statement implicating himself and others in the commission of the dacoity. But when the trial took place in the Court of the Sessions Judge he resiled from that statement and professed complete ignorance of the matter. Thereupon proceedings were taken against him and he was committed to the Court of Sessions to take his trial. The learned Sessions Judge has thereupon made this reference to this Court with a view to having it declared that the proceedings taken against the accused were without jurisdiction on the ground that the pardon had not been declared forfeited and the ground of forfeiture had not been reduced into writing. Under the present Code of Criminal Procedure no formal withdrawal of a pardon and no formal declaration that the pardon has been forfeited are required. If the person who has accepted a conditional pardon be subsequently proceeded against, it is open to him to plead on his trial that the pardon has not, in fact, been forfeited, that is to say, that he has not violated the conditions on which the pardon was tendered and accepted. This then becomes one of the issues to be heard and determined at the trial. In the present case, there is no need that the issue should be separately tried; for if on his statement made in the Court of the Committing Magistrate and on other evidence it be found that he took part in the commission of the dacoity in question it will follow that when he resiled from his first statement in the Court of Sessions and denied all knowledge of the matter, he violated the conditions on which the pardon had been tendered. So that the two questions whether he has forfeited the pardon and whether he has or has not been guilty of the offence of dacoity may be heard and determined together. In support of this view and for the information of the Sessions Judge we would refer him more particularly to the following reported cases: *Emperor* v. *Kothia* (1), *Kullan* v. *Emperor* (2) and *Emperor* v. *Abanibhusan Chakravarty* (3). With these remarks we return the record and direct that the trial be now proceeded with.

Reference discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1034 OF 1914.

SHARFUDDIN, J.
TEUNON, J.
1914,
19, August.

DY. SUPDT. & REMEMBRANCER OF LEGAL AFFAIRS, BENGAL,
Petitioner,
v.
KAILASH CHANDRA GHOSH & anr.,
Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 235, 239, Ills. (b)—Joinder of charges—Trial for more than one offence—Same transaction—Separate offences committed on a different day being part of the same transaction

The case for the prosecution was that on a certain day the accused wrongfully confined some persons, fined them and realised a portion of the fine, and on their promise to pay the balance three days later, they were released, but on their failure to make the payment on the appointed day, they were again wrongfully confined for realizing the balance of the fine and were beaten and otherwise maltreated. The Deputy Magistrate framed separate charges under

(1) I. L. R. 30 Bom 611 (1906).
(2) I. L. R. 32 Mad. 173 (1905)
(3) I. L. R. 37 Cal. 485 at p. 851 (1910).

sec 347, I. P. C., against the accused for each day's offence; he also framed a separate charge against the accused under sec. 352 and sec. 352, read with sec. 114, I. P. C., as having been committed by the accused persons on the last day. All the charged were tried together.

Held—*That the transaction of the last day was in continuation of what took place on the first day and the beating and other maltreatment alleged to have taken place on the last day were the concluding portion of the same transaction and the charges were rightly tried together.*

Emperor v. Datto Hanmant Shahapurkar (1) *and* Emperor v. Sherufalli Allibhoy (2), *followed.*

Budhai Sheik v. Emperor (3) *and* Gul Mahomed Sircar v. Cheharu Mandal (4), *distinguished.*

This was a rule granted on 19th June 1914, against an order of Annada Ch. Sen, Esq., Sessions Judge of Pabna, dated 12th May 1914, setting aside, on appeal, the order of Mr. B. Bagchi, Deputy Magistrate of Serajganj, dated 30th March 1914, convicting and sentencing the first accused under sec. 347, I. P. C., to rigorous imprisonment for six months and a fine of Rs. 500 and the second accused to rigorous imprisonment for one month and a fine of Rs. 25.

The facts of the case as stated by the prosecution were as follows :—

On the Bakr-id day (in September 1913), Abdul Shekh, one of the witnesses in the case, slaughtered a cow in the house of Nabu Shekh in a village (Paikara). Mazamali, Manik and Umedali took the meat and ate it.

On the 14th December these four persons who are tenants of Rai Banomali Ray Bahadur were taken to his zamindari cutchery at Deobhog, where the accused Kailash Chandra Ghosh, Inspector, and Ram Chandra Ghosh, naib of the zamindar, fined Abdul Rs. 200, and Mazamali, Umedali and Manik Rs. 50 each. They were confined for about 5 hours, and then some persons having stood sureties for them, they were released on their promise to pay the fine within three days. After the expiry of three days within which the fine was not fully paid, they were again on the 18th December brought to the said cutchery and confined there for about five hours and the accused ordered the peons to realize the fine imposed and by the orders of the Inspector the *peadas* beat Mazamali with shoes and by the orders of both the accused Mazamali and Abdul were beaten with shoes.

Rahimuddi Shekh, son of Mazam (one of the persons confined) gave information to the Raiganj thana and asked the help of the Police to rescue the confined persons.

The fact of Rahimuddin's going to the thana came to the knowledge of the accused, the Inspector then beat Mazamali with shoes, and drove him and three other confined persons out of the cutchery.

The charges against both the accused were that they on the 14th December wrongfully confined Mazamali Shekh, Abdul Shekh, Umedali and Manik Shekh for the purpose of extorting money, and they were further charged that they again confined, on the 18th December, the said four persons for the purpose of extorting money, a third charge against Kailash Chandra Ghosh was that he assaulted Mazamali and the third charge against Ram Chandra Ghosh was that he abetted the assault of Mazamali and Abdul.

The accused pleaded not guilty. The Deputy Magistrate of Serajganj who tried

(1) I. L. R. 30 Bom. 49 (1905).
(2) I. L. R. 27 Bom 135 (1902).
(3) I. L. R. 33 Cal. 292 (1905).
(4) 10 C. W. N. 53 (1905).

the case found both the accused guilty of all the charges.

The Sessions Judge of Pabna, on appeal, without entering into the merits of the case, was of opinion that there was misjoinder of charges which vitiated the trial and ordered the case to be re-tried; he held that the occurrences of the 14th and 18th December were separate and independent transactions and that there was no connection with each other and they were not parts of the same transaction.

On the application of the Deputy Superintendent and Remembrancer of Legal Affairs, Bengal, the High Court issued a rule upon the District Magistrate of Pabna and the Opposite Party to show cause, why the order of the Sessions Judge, dated the 12th May 1914, should not be set aside and the appeal re-heard on the merits.

Mr. Orr for the Crown.

Mr. J. N. Roy, with *Babus Harish Chandra Ray* and *Jogendra Narayan Majumdar* for the Opposite Party showed cause.

The JUDGMENT OF THE COURT was as follows:—

This Rule was issued calling upon the District Magistrate of Pabna and the Opposite Party to show cause why the order of the Sessions Judge, dated the 12th May 1914, should not be set aside, and the appeal re-heard on the merits. It appears that the two accused Kailash Chandra Ghosh and Ram Chandra Ghosh were tried under secs. 347, 352 and 352 coupled with sec. 114, I. P. C., convicted and sentenced. On appeal to the Sessions Judge an order was passed for a re-trial on the ground of misjoinder. In order to understand how the question of misjoinder arose certain facts have to be stated. There is a gentleman named Rai Banamali Ray Bahadur who is a zamindar. There is a prevailing practice in his estate that no one is allowed to slaughter cows. It appears that on the Bakr-id day just before the occurrence some Mahomedans slaughtered a cow. This was considered to be a breach of the practice of the estate and on the 14th December four men, *viz.*, Mazamali Shekh, Abdul Shekh, Umedali Shekh and Manik Shekh were called to the cutchery by two *peadas* and the Inspector and naib fined Abdul Shekh Rs. 200, and Mazamali, Umedali and Manik Shekh Rs. 50 each on account of the slaughter of the cow. It appears that on the 14th December only Rs. 9 was realised and the rest was promised to be paid three days later. On the 17th, the rest of the money was not paid, with the result that on the 18th, these persons were again brought to the cutchery and again confined. On coming to know that information had been sent to the Police on behalf of the confined persons they were beaten with shoe and ejected from the place in which they had been wrongfully confined. The question is, whether the occurrence that took place on the 14th December and the one that took place on the 18th December were two distinct transactions or form parts of one and the same transaction. It appears that the object was to punish certain Mahomedans of this estate for a breach of the rule of that estate in slaughtering a cow. It was with that object these four persons were brought to the cutchery, fined and a portion of the fines realised. These men had promised to pay the balance of the fines three days later, but they failed to do so, and so on the 18th, it is said, wrongful confinement again took place. There can be no doubt therefore that what took place on the 18th was in continuation of what took place on the 14th. It has been contended that on the 18th, another offence was committed, namely, offences under secs. 352

and 352 read with sec. 114, I. P. C. Therefore this was a distinct offence and not in the same transaction even supposing that the wrongful confinement on both days constituted one transaction. We think that the shoe-beating and other maltreatment of the Mahomedans when released from their wrongful confinement were the concluding portions of the same transaction. They were all confined for one purpose, namely, for the purpose of extorting money, and on being informed that the Police were coming, these men were shoe-beaten and turned out. The whole thing was really one transaction. The learned Sessions Judge was, however, of opinion that these were two distinct transactions. Therefore he held that there was a misjoinder and ordered a re-trial. The view that we have taken on the facts stated above is supported by the cases of *Emperor* v. *Dattu Hanmant Shahapurkar* (1) and *Emperor* v. *Sherufalli Allibhoy* (2). Our attention has also been directed to two cases by Mr. Roy, the counsel for the accused, *viz.*, the cases of *Budhai Sheik* v. *Emperor* (3) and *Gul Mahomed Sircar* v. *Cheharu Mandal* (4). The facts of the two last-mentioned cases are different from the facts of the present case.

We therefore make the present rule absolute, set aside the order of the learned Sessions Judge, dated the 12th May 1914, and direct that the appeal be now heard on the merits.

Let this record be sent down at once.

Rule made absolute.

(1) I. L. R. 30 Bom. 49 (1905).
(2) I. L. R. 27 Bom. 135 (1902).
(3) I. L. R. 33 Cal. 292 (1905).
(4) 10 C. W. N. 53 (1905).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1201 OF 1914.

JENKINS, C. J.
TEUNON, J.
——
FLETCHER, J.
1914,
Heard,
16, October.
Judgment,
23, October.

FAUJDAR THAKUR
Complainant, Petitioner.
v.
KASI CHOUDHURI & ors.,
Accused, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs 258, 439—Acquittal, setting aside o , by High Court in revision, on the application of the Complainant.

Held (*by* JENKINS, C. J., *and* FLETCHER, J.)—*That the High Court has jurisdiction under sec. 439, Cr. P. C., to interfere in revision with an acquittal, but it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice.*

The decisions of the different High Courts consistently support the view that as a general rule it is expedient not to interfere in revision at the instance of a private person with an acquittal after trial by the proper tribunal and that applications for that purpose should be discouraged on public grounds.

Per TEUNON, J.—*That under sec. 417, Cr. P. C., the right to present an appeal against an acquittal is vested in the Local Government, but an alternative remedy against injustice done to injured Complainants has been provided in sec. 439, Cr. P. C., and the High Court has ample jurisdiction to interfere and remedy the wrong, if wrong has been done. The section is expressed in the widest terms and vests in the Court an absolute and unqualified discretion to which the enactment has set up no bars or limits and which can not be fettered by judicial decisions.*

This was a Rule granted on the 13th

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July 1914, against an order of W. Lewis, Esq., Sub-divisional Magistrate of Samastipur, dated 20th June 1914, acquitting under sec. 258, Cr. P. C., the Opposite Party of the charge of an offence under sec. 148, I. P. C. The Complainant moved the High Court and obtained the rule which came on for hearing before Jenkins, C. J., and Teunon, J., who differed in opinion and under sec. 429, Cr. P. C., the case was referred to Fletcher, J.

Babu Debendra Narain Bhattacherjee for the Petitioner.

Babu Gour Chandra Pal for the Opposite Party.

Mr. Sultan Ahmed for the Crown.

The opinion of JENKINS, C. J. was as follows.—

JENKINS, C. J.—A charge was framed under sec. 148 of the Indian Penal Code against 23 persons, and after a lengthy trial they were acquitted. The Complainant thereupon applied to this Court for the exercise of its revisional powers under sec. 439 of the Indian Penal Code, with the result that a rule was issued in these terms: "Let the record be sent for and let a rule issue calling upon the District Magistrate of Darbhanga and the opposite party to show cause why the order of acquittal complained of should not be set aside and a re-trial ordered. Pending the disposal of the rule further proceedings under sec. 476, Cr. P. C., will be stayed." Cause has now been shewn.

The petition on which the rule was made does not mention proceedings under sec. 476 of the Criminal Procedure Code.

From the judgment however it appears that the Trial Magistrate expressed his intention to direct under sec. 476 of the Criminal Procedure Code the prosecution of Ram Khelawan Tewari under sec. 193 of the Indian Penal Code, and also of two persons described as Faujdar and Bahadur. Though Faujdar alone was the Petitioner, the stay apparently was intended to operate in favour of all three.

The case lasted, we have been told, about 3 months before the lower Court, many witnesses were examined, and an elaborate judgment was pronounced by the Trial Magistrate who fully discussed the voluminous evidence in the case, with the result that he came to a conclusion in favour of the accused on the two principal issues in the case. He held that the accused's party were in possession of the land in dispute, and that the injuries inflicted on the Complainant's party were a justifiable exercise of the right of defence.

I understand that the rule was granted on the ground that the Court was not satisfied with these conclusions, and that the interests of justice required an interference with the order of acquittal.

It is evident however that the conclusions of the lower Court must have rested largely, if not in their entirety, on the Trial Magistrate's appreciation of the evidence adduced before him.

The only question then is whether in the proper exercise of its discretion the Court ought to interfere for the purpose of setting aside the acquittal and sending back the case for a repetition of the lengthy trial of the case.

That we have power to interfere seems clear; but to the question whether we ought to interfere I would answer in the negative.

Sec. 417 of the Criminal Procedure Code enables the Local Government to direct the Public Prosecutor to present an appeal to the High Court from an order of acquittal passed by any Court other than a High Court.

This provision, which first appeared in

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the Code of 1872, provides the valuable safeguard that an accused cannot have his acquittal questioned by way of appeal except at the instance of the Local Government. But even with this safeguard the provision has met with considerable animadversion in recent times.

In this case however the court, so far from having the assurance of such a safeguard, is confronted by the fact that the application to set aside the acquittal is opposed not only by the accused but also by the Deputy Legal Remembrancer on behalf of the Crown.

And I can quite understand this opposition. The Complainant and his companions in the theft that led to blows were obviously mere puppets, and the real moving spirit is this same Ram Khelawan Tewari who is described as the Petitioner's master and has throughout been present in Court sitting behind the eminent counsel and vakils who have appeared on behalf of the complainant.

I will not discuss his merits or his frailties as disclosed by the Trial Magistrate's judgment, but it is apparent that this is one of a series of unsuccessful attempts to assert possession of the piece of land in dispute against the accused's party.

It has failed; but more than that, it has been held that possession was with the accused's party and proceedings against Ram Khelawan Tewari have been directed. This is a serious matter for him, and he obviously has an urgent personal interest in securing interference with the Magistrate's order. In view of all the circumstances before us I am convinced that the purpose of the application is not to secure the due administration of justice but to serve a personal end.

This, therefore, is not a case in which the Court should (in my opinion) interfere, and in expressing this view, I believe, I am acting in harmony with the tendency of the best judicial opinion as also sound principle.

The pronouncements of the High Courts of Madras, Bombay and Allahabad consistently support the view that as a general rule it is expedient not to interfere on revision at the instance of a private person with an acquittal after trial by the proper tribunal and that applications for that purpose should be discouraged on public grounds: *Thandavan* v. *Perianna* (1), *Heerabai* v. *Framji* (2), *Queen* v. *Ala Baksh* (3), *In re Aminuddin* (4), *Emperor* v. *Madar Baksh* (5), *Qayyum Ali* v. *Faiyaz Ali* (6).

This too was the view that prevailed in this Court until recent times [*Municipal Committee of Dacca* v. *Hingoo Ray* (7), *Deputy Legal Remembrancer* v. *Karuna Baistobi* (8)], but it is said that of late the matter has been differently regarded.

If there has been any conscious departure in more recent cases from the rule of prudence which prevailed in the authorities I have cited, I cannot agree with it.

Our attention has been invited to a decision in which I took part; as though it supported the new departure [*Rakhal Das Roy* v. *Kailash Ranu* (9)], I am in no way impressed by the value of that decision. In the first place, it appears that the vakil of the accused was not present and the decision possesses all the infirmity of a judgment given without the assistance of argu-

(1) I. L. R. 14 Mad. 363 (1890).
(2) I. L. R. 15 Bom. 349 (1890).
(3) I. L. R. 6 All. 484 (1884).
(4) I. L. R. 24 All. 346 (1902).
(5) I. L. R. 25 All. 128 (1902).
(6) I. L. R. 27 All. 359 (1904).
(7) I. L. R. 8 Cal. 895 (1882).
(8) I. L. R. 22 Cal. 164 (1894).
(9) 11 C. L. J. 113 (1909).

ment for the accused. And apart from that the circumstances were exceptional.

The error was one of pure law apparent on the face of the record while the offence was one under sec. 504; and I have always understood that offences of an essentially personal character such as defamation or insult were viewed differently for the purpose of revision, and for an obvious reason.

According to my understanding therefore this decision is of no assistance in the present case: if however it contravenes what I regard as the true rule of guidance then I do not hesitate to regard it as erroneous.

As I have already indicated, I am not prepared to say, the Court has no jurisdiction to interfere on revision with an acquittal, but I hold it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice.

This view does not leave an aggrieved Complainant without remedy; it would always be open to him to move the Government to appeal under sec. 417, and this appears to me the course that should be followed.

The result then in this case is that in my opinion the rule should be discharged.

But as I understand from my learned colleague, that he would make the rule absolute, we are equally divided in opinion and the case, with our opinions thereon, must therefore be laid before another Judge.

The opinion of TEUNON, J., was as follows :—

TEUNON, J.—In this case one Kasi Choudhuri and 22 others were placed on their trial before the Sub-divisional Magistrate of Samastipur on charges of rioting under secs. 148 and 147 of the Indian Penal Code.

On behalf of the prosecution it is alleged that on the death of one Rameswar Choudhuri his lands (including the field in dispute known as plot No. 65 in village Hatharua) were inherited by his widow Paltu, that some 1½ years before the occurrence now in question she removed to the house of her daughter and son-in-law in a neighbouring village called Chok Salem, and on the 4th April 1913, by a registered deed, sold her inheritance to the real Complainant, one Ram Khelawan Tewari. Ram Khelawan, it is said, took possession and on the day now in question, 15th March 1914, sent his servant Faujdar Thakur and six or seven labourers, with two bullock-carts, to bring home the crop of *arhar* from plot No. 65.

The case for the prosecution then is that while these men were loading the crop into the carts, the accused and others, to the number of 30 or 35, armed with *lathis* and *gorasas* (axes) fell upon the party of labourers, put them to flight, and inflicted upon them a number of injuries.

The medical and other evidence in fact shows that of the seven or eight labourers, six were wounded, sustaining, in all, 28 injuries of which one is described as severe, five were on the head, and nine on the back.

In so far as the occurrence is concerned, the Trying Magistrate has accepted the case for the prosecution as substantially true. He finds that Faujdar and his companions were unarmed, and that they were attacked by a mob of men armed with *lathis* and *gorasas*, and that this mob included the majority, if not all, of the accused placed on their trial.

He comes to no finding as to the complicity of the individual accused obviously because he next proceeds to acquit them all on the ground that, of the accused, Kasi

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and Narsingh (who are cousins of Rameswar) and their sons Ramyad and Baldeo (and Bachu) were in possession of the field in question and that they and their companions were therefore acting in the exercise of the right of private defence of property.

This brings us to a consideration of the defence.

The accused have said nothing regarding either the occurrence or possession, but have contented themselves with pleading not guilty. Their case in so far as it can be ascertained from the cross-examination of the prosecution witnesses and the depositions of the few defence witnesses examined is that Rameswar (the deceased husband of Paltu) and his brother Mahadeo were not separate, as is the case for the prosecution, but joint in mess and property, that Ramewar predeceased Mahadeo, that Mahadeo in his life time adopted Ram Golam, the son of his cousin Kasi, that since Mahadeo's death some 18 years ago first Ram Golam, and, on his death, Kasi on behalf of Ram Golam's minor son Chandrika has been in possession.

With regard to the adoption of Ram Golam, the Trying Magistrate observes that "this line of defence" was dropped, and that the defence then resolved itself into a bare assertion of possession. Possibly this attitude was taken up in the course of argument, but in so far as the record goes possession based on the adoption of Ram Golam is the only case that the defence made any attempt to establish. There is uncontradicted evidence that Mahadeo and Rameswar lived apart from their cousins (or second cousins) Kasi and Narsingh and of possession by Narsingh and his sons (who, P. W. 12, are again separate from Kasi and his son) since the death of Mahadeo there is not a tittle of evidence on the record.

As regards Kasi's possession, the finding is based on (1) the estate register of mutations or changes among its tenants for the years 1319 to 1321, (2) a Chaukidari assessment register, (3) certain receipts, (4) an oral complaint made by Ramyad to the Manager of the Estate (P. W. 14), and (5) the oral evidence of three defence witnesses.

The prosecution, it may be observed, relies upon the same receipts and upon what the Trying Magistrate cursorily describes as the *khatian* that is the entry in respect of plot No. 65 in a record-of-rights finally published in or about the year 1901-02.

That entry, it may be noted here, shows that the tenants in possession are Musammat Paltu and Ram Golam (adopted son).

The mutation registers were produced by the defence witness No. 1 who describes himself as the "mutation inspector" of the circle. It is significant that the defence did not call for any register prior to 1318, and from this and the evidence of the witness it may be safely inferred that up to 1318 or rather 1319 the estate registers are in conformity with the record-of-rights. The change introduced in 1319 was the substitution of the name of Chandrika for the name of his deceased father Ram Golam. This change, it may be said, in no way affected the position of the widow Paltu, and, in any case, as the witness says, was made without any reference to her or to any one interested on her behalf.

The assessment register does not show the name of Paltu but, as appears from the evidence of the witness who produces it, the register is based on hearsay and the absence of the widow's name may further be due to its being considered that she was not liable to assessment.

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Such receipts as have been produced show that from the year 1292 to 1308 (say 1901-02) the payment was made by Kasi on behalf of Mahadeo, that in 1908 and in 1912-13 the payments were by Kasi or by Kasi's son Ramyad on behalf of Paltu and Ram Golam. The change in name, it is suggested by the Trying Magistrate, is due to some change in the Malik's register, but that change was obviously due to the record-of-rights, and the receipts are in accordance with that record.

On the complaint of Ramyad to the Manager no action was taken : It was subsequent to the purchase of Ram Khelawan, and is obviously of no more value than Ram Khelawan's unsuccessful application to the same Manager for mutation.

From this resumé of this portion of the evidence it is clear that, in coming to his finding regarding possession, the Magistrate has relied on registers that are either worthless or inadmissible, has misapprehended the true significance of the receipts produced and the acceptance of such receipts by one or more of the agnates who now claim possession on their own account, and has also wholly overlooked the probative value that, under sec. 103B of the Bengal Tenancy Act, should have been given to the entry in the record-of-rights.

I need not examine the oral evidence on either side as the Magistrate's view of this evidence (both as regards Paltu's possession and as regards the possession of Ram Khelawan subsequent to his purchase) has been coloured by his erroneous view of the documents already referred to and also by a prejudice against Ram Khelawan based largely on police reports wholly inadmissible in evidence.

There being no evidence of any adoption, and that case having been in fact abandoned, it is clear that all the documentary evidence, and even the oral evidence adduced by the defence (*vide* for instance D. W. 3) indicates that in so far as prior to Ram Khelawan's purchase Kasi and his son Ramyad cultivated these fields, they did so on behalf of the widow, and it is doubtless because of her complaints against them (*vide e.g.* Def. witness 4) that she retired to Chok Salem and finally sold her lands to Ram Khelawan.

On my consideration of the evidence I am therefore satisfied that there are grave reasons for thinking that the finding as to possession is wrong. In any case, on a finding arrived at by a process of reasoning vitiated by so many errors no value can be placed.

Even, however, if we assume that the Magistrate is right in his finding that possession was with Kasi and others, and that the act of the Complainant in removing or seeking to remove the crops constituted the offence of theft, we have next to consider whether the Magistrate has adequately dealt with the further questions regarding the right of private defence.

On these questions all he says is this : " As the thana is no less than six miles from the place of occurrence, *Ganouri Lall* v. *Queen-Empress* (10) must clearly be distinguished. *Pachkauri* v. *Queen-Empress* (11) is followed. In that case it was held that if accused were rightfully in possession of the land and found it necessary to protect themselves from aggression on the part of another body of men, they were justified in taking such precautions, as they thought were required and using such force or violence as was necessary to prevent the aggression. This applies to the circumstances of this case."

(10) I. L. R. 16 Cal. 206 (1889)
(11) I. L. R. 24 Cal. 686 (1897).

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This judgment does not show that it was present to the mind of the Magistrate that the burden of proving circumstances bringing the case within the general exception contained in sec. 96 of the Indian Penal Code was upon the accused. It further does not show that he had any due regard to the restrictions placed upon the exercise of the right of private defence by the 3rd and 4th clauses of sec. 99. True he says, the thana is six miles off, but he makes no reference to Daffadars and Chaukidars of whom one, it is in evidence, lives not more than 10 bighas from the field in dispute. He has not adverted to his own finding that Faujdar and his six or seven companions were unarmed, nor, so far as appears, has he taken into consideration the number of persons injured and the number and position of the injuries sustained. He does not appear to have inquired whether for instance the injuries on the back were caused in the exercise of the right of private defence, nor has he made any endeavour to ascertain which of the accused is responsible for specific injuries. Even if some of the accused have succeeded in bringing themselves within the exception it does not follow that all have done so.

For these reasons I am satisfied that there has been no proper trial of this case, and I should therefore set aside the order of acquittal in the case of each of the accused and direct that they be re-tried before another Magistrate in accordance with law.

It has been urged before us, that inasmuch as under sec. 417 of the Code the right to present an appeal against an acquittal is vested in the Local Government, and in the Local Government alone, and inasmuch as the Local Government, so far from appealing, has appeared through its accredited representative in support of the Magistrate's judgment we ought not, at the instance of a private Complainant, to interfere with or disturb the present order of acquittal. But, doubtless for good reasons, the Legislature has not constituted the Local Government the sole arbiter in these matters. An alternative remedy against injustice done to injured Complainants has been provided in sec. 439 of the Code (I need not here refer to the Charter), and even where, as in this case, the Local Government has taken the unusual course, in my experience the unprecedented course, of appearing to justify what is *primâ facie* riotous behaviour, it is conceded that we have ample jurisdiction to interfere and remedy the wrong, if wrong has been done. It has indeed been faintly suggested on behalf of the accused that by proceeding under sec. 494 of the Code, the Local Government may nullify any order this Court may make. But this suggestion has not come from learned Counsel appearing on behalf of the Local Government. It is not to be anticipated that the Local Government will take this course, and we need not therefore at the present stage consider whether the Judge's order of consent predicated by sec. 494 is not again an order subject to the revisional jurisdiction of this Court.

The question thus becomes one not of jurisdiction but of discretion and as to the manner in which discretion should be exercised a large number of decided cases of which the cases of *Heerabai* v. *Framji* (2), *Thandavan* v. *Perianna* (1), *Queen-Empress* v. *Ala Baksh* (3) and *Municipal Committee of Dacca* v. *Hingoo Ray* (7) are examples have been cited before us. But with all deference to the learned and

(1) I. L. R. 14 Mad. 363 (1890).
(2) I. L. R. 15 Bom. 349 (1890).
(3) I. L. R. 6 All. 484 (1884).
(7) I. L. R. 8 Cal. 895 (1882).

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experienced Judges, who decided those cases, I am not pressed by their decisions, nor do I consider it necessary to determine whether the present case does or does not fall within one or other of the rules or general principles therein enunciated. The enactment has set up no bars or limits to our discretion. That being so, this discretion cannot be fettered by judicial decision, and in this connection it is sufficient to cite the observations of His Lordship the Chief Justice to be found in the case of *In re an Attorney* (12). "The section is expressed in the widest terms and vests in the Court an absolute and unqualified discretion. Not one jot or tittle can be taken away from or added to the plain and express provisions of the Legislature by any decision of the Court; nor can the discretion vested by the section in the Court be crystallised or restricted by any series of cases; it remains free and untrammelled to be fairly exercised according to the exigencies of each case." With these observations I am in entire agreement and, in my opinion, they are equally apposite to the section now under consideration, as to the section then in question.

In the interests of public justice it may, in certain cases, in my opinion, be as important to redress injustice done to Complainants as in other cases to remedy the wrongs of persons unjustly condemned. In the view I have taken of this case and for the reasons I have given, justice in my opinion demands that there should be a re-trial. I should therefore as I have already stated set aside the order of acquittal and direct that the accused be re-tried by another Magistrate in accordance with law.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This case has been laid before me under the provisions of sec. 429 read with sec. 439 of the Code of Criminal Procedure, owing to there being a difference of opinion between the learned Chief Justice and Teunon, J., before whom the case came. Twenty-three persons were charged with having committed an offence punishable under sec. 148 of the Indian Penal Code.

After a trial which lasted about three months the Magistrate acquitted all the accused. An application was then made to this Court to set aside the acquittal and to direct a re-trial. That application came on before Sharfuddin and Teunon, JJ., who issued a rule on the opposite party to show cause why the order of acquittal should not be set aside and a re-trial ordered. The rule subsequently came on for hearing before the learned Chief Justice and Teunon, J., who differed in opinion—the Chief Justice being of opinion that the rule ought to be discharged, whilst Teunon, J., was of opinion that the rule should be made absolute

The application to set aside the order of acquittal is opposed both by the accused and by the Local Government.

The present application raises a point of considerable public importance, namely —ought the Court ordinarily to exercise the powers which it undoubtedly has under sec. 439 of the Code of Criminal Procedure to set aside an order of acquittal at the instance of a private prosecutor? All the High Courts in India have for many years past consistently held that they ought not so to do. It will be sufficient if I give the references to the reported cases in support of this proposition. They are *Queen-Empress* v. *Shaikh Budruddin* (13), *Heera-*

(12) I. L. R. 41 Cal. 446 (1913).

(13) I. L. R. 8 Bom. 197 (1883).

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bai v. *Framji* (2), *Thandavan* v. *Perianna* (1), *Queen-Empress* v. *Ala Baksh* (3), *Queen-Empress* v. *Prag Dat* (14), *In re Aminuddin* (4), *Qayyum Ali* v. *Faiyaz* (6), *Municipal Committee of Dacca* v. *Hingoo Ray* (7) and *Deputy Legal Remembrancer* v. *Karuna Baistobi* (8). The learned Chief Justice was of opinion that the settled practice of the Courts founded on sound judicial opinion and public grounds should be adhered to.

Teunon, J., on the other hand was of opinion that as sec. 439 of the Code of Criminal Procedure is drawn in the widest terms, no previous decisions could in any manner fetter the way in which the Court should exercise the discretion vested in it under the section. In support of this view, Teunon, J., referred to certain remarks of the Chief Justice in the case *In re an Attorney* (12). But with all due respect to the learned Judge those remarks of the learned Chief Justice do not affect the point under consideration. The Deputy Legal Remembrancer informed me that some four or five rules have of recent times been granted by this Court on applications by private prosecutors to set aside orders of acquittal. He however also informed me that all these rules excepting one were granted by the Bench which granted the rule in the present case. That cannot, in my opinion, be taken as casting doubt on the well established rule adhered to both in this Court and in the other High Courts in India over a long series of years. That rule is founded on grounds of public interest and convenience and ought, I think, to be adhered to.

In addition to the difference of opinion of the learned Judges in the present case as to there being a settled practice that the Court will not ordinarily interfere in revision at the instance of a private prosecutor with an order of acquittal, the learned Judges also differed as to whether the circumstances in this case were such as would induce the Court in any event to interfere.

The learned Chief Justice was of opinion that there was no reason to think that the Magistrate whose judgment rests on an appreciation of the evidence that had been given before him came to a wrong conclusion Teunon, J., on the other hand thought that there were strong grounds for thinking that the judgment of the Magistrate amounted to a miscarriage of justice. I see no reason to assent to the view of Teunon, J.

No one can doubt that the Complainant in this case is merely the creature of Ram Khelawan Tewari and that this prosecution forms one of a series of cases in which Ram Khelawan Tewari has tried to enforce his right to the land in question.

I, therefore, agree with the view set out by the learned Chief Justice in his judgment. The rule must therefore be discharged.

Rule discharged.

(1) I. L. R. 14 Mad. 363 (1890).
(2) I. L. R. 15 Bom. 349 (1890).
(3) I. L. R. 6 All. 481 (1884).
(4) I. L. R 24 All. 346 (1902).
(6) I. L. R 27 All. 359 1904).
(7) I. L. R. 8 Cal. 895 (1882.
(8) I. L. R. 22 Cal. 164 (1894).
(12) I. L. R. 41 Cal. 446 1913.
(14) I. L. R. 20 All. 459 (1898).

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NOTES.

Sir Satyendra Prasanna Sinha.

The knighthood conferred on Mr. S. P. Sinha is a somewhat tardy recognition of his services to Government, in his capacity, first, as Advocate-General of Bengal, and, later on, as Legal Member of the Viceroy's Council. But apart from these services, Government might well have marked its sense of the pre-eminent position he holds in the profession and in the public life of the Province by conferring this honour on him. The Indian community will greatly appreciate the honour bestowed by Government on one of its leading members.

American Judges' Association.

The United States of America claim to have led the way in many matters, often no doubt without sufficient justification, but a permanent association of Judges is an entirely American creation, and whilst this association has already recorded the proceedings of its second annual meeting, the idea of forming such a nation-wide association of Judges or that it can serve any useful purpose does not appear to have occurred to any one outside the States. The first conference of the Judges met in 1913 at Montreal in connection with the meeting of the American Bar Association which was made memorable by the part taken in it by the present Lord Chancellor of England. The second meeting was held in October last at Washington and was presided over by Justice Orrin N. Carter of the Supreme Court of Illinois whose speech delivered at that meeting appears in a recent issue of the *Chicago Legal News*.

An outsider may well enquire why this association was formed at all. It cannot certainly be for pleasure or profit. A Judge's "Defence" association is conceivable, but is not likely, and would, if Judges did associate for such a purpose, be a menace to public liberty. But the purpose, for which the Judges in America have met in conferences, is so noble and modest, that so far from there being anything to fear from them, they are likely to be of incalculable benefit to the public. The association, in the words of its by-law, is "established for conference, discussion and interchange of ideas as to the duties and responsibilities of the judiciary.' The conferences are not closed-door conclaves. They are open discussions, and the spirit which animates them will best be gathered from the opening lines of Justice Carter's speech:

"The chief duty of the judiciary is to administer justice. The Courts were established for that purpose. In view of the discussions that we have heard on this question in recent years, it is evident that many believe that the Courts have failed in this regard. Is there any substantial basis of this growing volume of criticism? If there be, the Judges should be the first to try to bring about such necessary changes as will remove all just causes for complaint." "During the last decade or two", he adds, "the Courts have doubtless been more severely criticised and their actions more frequently condemned than at any time since we were a nation."

Justice Carter and his colleagues do not resent such criticism. On the other hand, he finds reasons for congratulating the Judges of America on the fact that charges of judicial corruption have never been levelled against them since America became an independent people. In England too judicial corruption has been a thing of the past for nearly two centuries. But it was not always so, and it reflects the greatest credit upon the political evolution of England that it should, within this brief period, have made it possible for its judiciary to reverse its

past repute so completely that the integrity of Judges has now come to be one of the axiomatic facts of English political life. Incidentally Justice Carter draws a picture of English Judges as they were, or believed to be, in the past which makes interesting though not altogether savoury reading. We reproduce it elsewhere as a legal curiosity and also to show by contrast what marvellous improvements have been brought about by changing the system under which Judges hold their office. Provided men of the highest legal attainments and of proved integrity are appointed, it seems to make little difference whether the Judges are appointed as in England by the Lord Chancellor or elected as in America. The important thing is to select the best and to make them free from external control and influence.

But even Judges who have placed themselves above corruption may be, and often are, individually and as a body, open to criticism in other respects. Justice Carter is frank enough to admit that the dissatisfaction with the Courts in recent years has been responsible in part for placing many of the powers of Government, formerly in the Judicial Department, in the hands of commissions or similar organisations heretofore considered a part of the Legislative or Executive Department of Government. The remedy, however, is everywhere proving worse than the disease. Justice Carter foresees that the matters now administered by departmental bodies must revert to the Courts, and with the increasing complexity of modern institutions the Courts will be charged with many more administrative duties than formerly. And there can be no question that the inductive method which English and American Judges traditionally follow is surely the best suited to grapple with the growing problems of social life. It combines, in the words of Professor Roscoe Pound, one of the severest critics of Courts and judicial methods, the possibility of certainty and flexibility better than any other form of administering justice. It would thus appear that improvements in judicial administration under modern conditions must depend ultimately on the personal factor. Judges must individually and as a body rise equal to the demands made upon them. Not only must appointments to judicial offices be made with scrupulous regard for public interests, but each individual Judge in his place must be unceasing in his endeavour to fit himself better and better for the discharge of his duties—the most responsible that have to be performed by any body of public officials.

The judiciary in America—all honour to them—is not content with resting on the reputation earned by their predecessors. Shaw, Marshall, Kent, and Cooley, to mention only a few, are great names, and, their successors may well feel legitimate pride that their inheritance has fallen on them. But like prudent heirs they are anxious not only not to see that noble inheritance dissipated but even to improve it. Can a nobler purpose animate conscious human endeavour than that of the Judge who seeks to fulfil in spirit and in letter the command of the ancient law-giver: "Hear the causes between your brethren, and judge righteously between every man and his brother and the stranger that is with him; ye shall not respect persons in judgment, but ye shall judge small as well as the great; ye shall not be afraid of the face of man. . . Ye shall justify the righteous and condemn the wicked"?

Consent if excuses civil liability when act made criminal by statute irrespective of consent—Statutory rape.

In two recent American cases, the Plaintiff, a female less than 16 years of age, and not the wife of the Defendant, sued the latter for damages for assault and battery, the Defendant having had carnal knowledge of the Plaintiff with the latter's consent. Such an act is rape by local statute, and the consent could not be pleaded in defence of a criminal charge for rape. The question was whether consent in fact absolved the Defendant from civil liability. The Courts in both cases held that the Defendants were liable, consent having in their view been made legally impossible by statute. Such a view undoubtedly leads to the anomaly of holding that consent which in fact was given nevertheless did not exist. A writer in the *Harvard Law Review* for November last in commenting on these decisions observes:—

It is less fictitious and equally in harmony with the wording of the statutes cited to say that consent is made immaterial to criminal liability. The more satisfactory basis for the result is the reasoning underlying the well-established doctrine that the consent of either participant in an illegal mutual combat is no defence to an action by the other: *Bell* v. *Hansley*, 3 Jones (N. C.) 131. This rule appears to rest upon consideration of poli[cy] which render it supposedly inadvisable th[at] consent to such a breach of the peace shou[ld] remove all civil liability. Such a conception [is] anomalous in civil law where consent is normal

a complete defence. But the Courts have probably been influenced by the criminal law principle that consent does not excuse an act which leads to a breach of the peace or serve bodily harm unless it negatives an essential element of the crime. If the doctrine of these mutual combat cases be accepted, as it must on authority, it seems *à fortiori* sound to allow an action to the immature victim of such a crime as that in the principal cases where there has been an express legislative declaration of policy.

A CHAPTER IN PAST ENGLISH AND AMERICAN JUDICIAL HISTORY.

[*From an address delivered by Justice Orrin N. Carter before the Judicial Section of the American Bar Association on October 20, 1914.*]

We find recorded in that ancient treatise, the Mirror of Justices, that King Alfred hanged forty-four judges because of their false judgments. (7 Mirror of Justices, Selden Society, p. 166.) The names of the Judges and their victims as well as the character of their offences are specifically set out. In a book published in 1641 entitled "A Speech against the Judges for their Ignorance" a member of the British Parliament censured most fiercely the judiciary of his time. In 1650 in another quaint old book entitled "The Judges Judged," the title-page asks the question, "Who have been England's Enemies and the People's Destroyers?" and the author attempts to show that the Judges of England occupied that unenviable position. A few years later, in 1680, another curious book was published, entitled "The Triumph of Justice over Unjust Judges" (Independence of the Judiciary, 26 Green Bag, p. 345.) One of the early English writers, in speaking of the Judges at the close of the thirteenth century, states that the "Justiciars had ruined the people with delay in their suits and enriched themselves with wicked convictions." (Jeafferson, A Book about Lawyers, p. 123.)

Corruption seems to have been rampant during the Middle Ages. The Judges received small salaries, being paid by fees and by gifts that were presented to them by their admirers or by litigants, often for the purpose, of influencing decisions. Historical writers do not question the fact that, during a part of this period at least, judicial offices were sold. As late as the eighteenth century, in the trial of one of England's Lord Chancellors it was proven that he had sold masterships. (5 Campbell's Lord Chancellors, p. 390.) This trial grew out of the scandals associated with some of the judiciary who were instrumental in causing many persons to invest large sums in what is usually called the "South Sea Bubble." (Jeafferson, A Book about Lawyers, p. 141.) The sale of judicial offices was naturally followed by charges of the sale of judicial decisions. Rich and poor alike believed that such decisions were bought and sold. A political ballad written about the time of Edward I gives a picture of this corruption, two lines of which read:

"Judges there are whom gifts and favorites control,
Content to serve the devil alone, and take from him a toll."

(Jeafferson, A Book about Lawyers, p. 123.)

It was a common thing for Judges when travelling the circuit at the opening of the Court to be given public feasts by some of the litigants. Bacon was not more guilty on the question of accepting presents than most of his contemporaries. Lord Chief Justice Hale seems to have bee a marked exception. He refused publicly gifts that were sent to him, quoting at one time the scriptural text, "A gift blinds the wise and perverts the ways of judgment." One cause for all of this corruption was the method of appointment and payment of Judges. They were dependent upon the King's favour for both. It was not until the reign of George IV that Judges were placed upon salaries and only a comparatively short time theretofore that their positions were not entirely dependent upon royal power. (Jeafferson, A Book about Lawyers, pp. 147, 160.) At present, in Great Britain, judicial appointments are still subject to favor, and while Judges cannot be removed during good behavior, their promotion still rests with the sovereign. (Dicey's Law and Opinion in England, p. 362.) During the Colonial history of this country Judges were not free from short-comings and difficulties of this kind. It seems that in the New England colonies, presents were given by litigants and received by the judiciary. (1 Warren, History of Harvard Law School and Early Legal Conditions in America, p. 61.) Two of the long series of charges made in the Declaration of Independence against George III, concerning his method of governing the colonies were, "He has obstructed the administration of justice by refusing to assent to laws establishing judiciary powers. He has made Judges dependent on his will alone for the continuance of their office and the amount and payment of their salaries."

[NOTE.—In the concluding portion of the extract, Justice Carter appears to indicate a not unnatural bias in an American Judge in favour of the elective method of appointing Judges. In the abstract, however, this mode is more open to criticism than that now prevalent in England, *viz.*, appointment at the discretion of the holder of the highest judicial office. We are not aware also that George III ever interfered with the Colonial Judges after the manner of James I, though they no doubt held office at the King's pleasure in the same way as the Judges of the High Courts in India, in theory, do to the present day. But in practice the tenure of office of High Court Judges in India hardly differs from that of Judges in England, and we dare say, this was also the case with the Colonial Judges in George III's time. The passage in the Declaration of Independence cited, written as it must have been in times of intense political passion, has to be taken, therefore, with reservations. So far as our own knowledge of history goes, it seems to us to be beyond question that long after judicial purity had become an established fact in England, corruption in other departments of public life continued rife. It is highly significant that soon after England awoke to the necessity of securing purity in Parliamentary elections, the Parliament made over its jealously

guarded privilege of exclusively determining election complaints to the judiciary.]

REVISION BY HIGH COURT OF ORDER OF ACQUITTAL.

In the Code of 1872 the law relating to revision by the High Court stood as follows:—

Sec. 294 provided—"The High Court may call for and examine the record of any case tried by any subordinate Court for the purpose of satisfying itself as to the *legality or propriety of any sentence or order passed and as to the regularity of the proceedings* of such Court."

Sec. 297 provided—"If . . it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit."

As regards appeal against an order of acquittal, provision was for the first time made in the Code of 1872 in sec. 272 which laid down—"The Local Government may direct an appeal by the Public Prosecutor or other officer specially or generally appointed in this behalf from an original or appellate judgment of acquittal, *but in no other case shall there be an appeal from a judgment of acquittal passed in any Criminal Court.*" Some very material changes were made in the Code of 1882. The revisional power of the High Court was much enlarged in the manner following: Sec. 435 authorised the High Court to call for and examine the record of *any proceeding* before any inferior Criminal Court . . for the purpose of satisfying itself as to *the correctness, legality or propriety of any finding, sentence or order* recorded or passed *and as to the regularity of any proceedings* of such inferior Court.

Sec. 439 authorised the High Court to exercise *all the powers of an Appellate Court.*

So for the first time in the Code of 1882 the High Court was authorised to revise the proceedings of the lower Courts on facts.

As regards appeal against acquittal, the words "in no other case shall there be an appeal from a judgment of acquittal passed in any Criminal Court" which were in sec. 272 of the Code of 1872 were omitted in the corresponding section of the code of 1882 (sec. 417). Perhaps these words were considered superfluous in the face of sec.404 (in the Code of 1882; sec. 286 in the mule of 1872) which says that no appeal shall menwm any judgment or order of a Criminal ous regxcept as provided for by this Code or by dividual Jlaw for the time being in force.
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These secs. (435, 439, 417, 404) remain unaltered in the Code of 1898.

As far back as 1876, when the Code of 1872 was in force, a Full Bench of the Allahabad High Court held that the High Court is not precluded by a judgment of acquittal from exercising its powers of revision under sec. 297 of Act X of 1872, but such powers could only be exercised when the judgment of acquittal proceeded on an error of law, and not where it proceeded on an error of fact. (*In the matter of Hardeo*, I. L. R. 1 All. 139.)

In *Sukho* v. *Durga Prosad*, I. L. R. 2 All. 118 (also decided under the Code of 1872), Straight, J., held that a private prosecutor could move the High Court in the case of an acquittal to exercise its powers of revision under sec. 297 of Act X of 1872.

In *Queen-Empress* v. *Ala Buksh*, I. L. R. 6 All. 484, it was held (under the Code of 1882) that in cases of acquittal the revisional powers should be sparingly used and save in very exceptional cases, not at all in reference to questions of fact, but the Judges observed that "it is not an inflexible rule that when either Government on the one side or an accused on the other has a right of appeal and does not exercise it, the powers of the High Court under sec. 439 cannot be exercised.

In *In the matter of Sheikh Aminuddin*, I. L. R. 24 All. 346 (decided under the Code of 1882), it was held that in the case of an acquittal by a Subordinate Magistrate, where the Local Government does not appeal, the High Court will not as a general rule entertain a reference direct from the District Magistrate under sec. 438, Cr. P. C. The same view was also taken in *Emperor* v. *Madar Baksh*, I. L. R. 25 All. 128.

In Bombay, it has been held in *Harabai* v. *Framji* (I. L. R. 15 Bom. 349, decided under the Code of 1882), that though the High Court has the power under sec. 439 to revise an order of acquittal, yet ordinarily it does not interfere with such an order in the exercise of its revisional jurisdiction because an appeal can always be made by the Local Government under sec. 417.

In Madras Sir Arthur Collins, C. J., and Weir, J., expressed themselves very strongly in *Thandavan* v. *Periana*, I. L. R. 14 Mad. 363 (decided under the Code of 1882), against interfering in revision with an order of acquittal. In this case, the complainant filed an application in the High Court for the revision of an orde of acquittal made by the Sessions Judge

Their Lordships declined to hear counsel who appeared to support the petition and dismissed it with the following remarks in the judgment —"An appeal against acquittal by way of revision is not contemplated by the Code, and it *should on public grounds be discouraged.* Acting therefore under the discretionary power given in sec. 440, Cr. P. C., we decline to hear the learned counsel who appears to support the petition and we dismiss the application."

In Calcutta it was the rule with the High Court not to interfere in revision with an order of acquittal. See *In re the Municipal Committee of Dacca* v. *Hingoo Raj*, I. L. R. 8 Cal. 395. In this case the District Magistrate made a reference to the High Court under sec. 296 of the Code of 1872 (corresponding to the present sec. 438) recommending the setting aside of an order of acquittal by a Bench of Honorary Magistrates. Prinsep and O'Kinealy, JJ., held—"It is a rule of this Court that as a Court of Revision it cannot interfere with an order of acquittal."

In 19 W. R. Cr. 52, it was held that the Court has no jurisdiction to entertain any application to interfere with the acquittal of an accused person unless the application be made either by Government or under the sanction of Government. In 21 W. R. Cr. 21, it was held that the High Court has no power to set aside an order of acquittal even where a Deputy Magistrate acts illegally and acquits the prisoner improperly. In 7 C. L. R. 142, it was held that it is not the practice of the High Court to interfere by way of revision with an acquittal against which the Government may appeal. But it must be remembered that all these cases were decided under the Code of 1872, that is, before the High Court was invested with its present enlarged power of revision. Coming to the recent cases, we find the following instances in which an order of acquittal has been set aside by the High Court in revision on the application of the complainant:

Rupa Mandal v. *Keshab Mandal*, 5 C. L. J. 452 (Rampini, Gupta, JJ.).

Their Lordships observed that the High Court should not interfere in a case of acquittal unless there has been a miscarriage of justice, but in this case they interfered on the ground that the judgment of the lower Appellate Court was such that it was impossible to form an opinion as to the merits of the case from that judgment.

F. D. Bellow v. *Mrs. Parker*, 7 C. W. N. 1 (Harington, Brett, JJ.).

In this case the Magistrate having heard the complainant framed a charge against the accused, but subsequently without hearing any further evidence for or against either party dismissed the case and acquitted the accused. This was held to be illegal and the order of acquittal was set aside.

Rakhal Das Roy v. *Kailash Banu*, 11 C. L. J. 113 (Jenkins, C. J., D. Chatterjee, J.).

The accused was charged under sec. 504, I. P. C. The trying Magistrate held—"The accused was justified under sec. 104, I. P. C., in voluntarily causing the harm, *i.e.*, using abusive language to the complainant." Taking this view the Magistrate acquitted the accused.

Jenkins, C. J., held—"It is manifest that sec. 104 can have no application by way of defence to the charge brought against the accused in this case, and as it is only on the strength of sec. 104, that the accused has been acquitted, we must set aside the acquittal and direct a re-trial."

Kangali Sardar v. *Ramacharan Bhattacharjee*, 38 Cal. 786 (Caspersz, Sharfuddin, JJ.).

In this case the lower Appellate Court set aside the conviction and sentence on the ground that the place of occurrence was outside the local limits of the trying Magistrate's jurisdiction overlooking the provisions of sec. 531, Cr. P. C. The High Court set aside the order of acquittal, and directed a re-hearing of the appeal.

N.B.—In this case, objection was taken on behalf of the accused in showing cause against the rule that the High Court ought not to interfere in revision with an order of acquittal, and reliance was placed on sub-sec. (5) of sec. 439. The Judges overruled the objection and held —"The Petitioner is the complainant and we entertain no doubt that we can deal with an order of this kind in accordance with the practice of this Court in a series of cases."

Rampiwan Rai v. *Abilakh Barai*, 18 C. W. N. 584 (Imam, Chapman, JJ.).

This was a case under sec. 352, I. P. C. (summons case) and the Magistrate after examining the witnesses for the prosecution and defence and holding a local enquiry fixed a date for argument and judgment, but the complainant failed to appear on that date, and the Magistrate acquitted the accused under sec. 247, Cr. P. C. The complainant moved the Sessions Judge who made a reference to the High Court. The High Court on that reference set aside the order of acquittal.

Sheikh Bagu v. *Raika Sing*, 18 C. W. N. 1244 (Sharfuddin, Teunon, JJ.).

In this case, the accused was acquitted under sec. 258, Cr. P. C. The trying Magistrate in his judgment laid great stress on all considerations that might affect the credibility of the witnesses for the prosecution but omitted to consider what might be considered in their favour and also failed to appreciate the corroborative value of an important witness for the prosecution. On the application of the complainant the High Court set aside the order of acquittal on the merits.

The question whether the High Court should interfere with an order of acquittal on the application of a private prosecutor may however be said to have been settled, so far as the Calcutta High Court is concerned, by a recent decision: *Faujdar Thakur* v. *Kasi Choudhuri*, 19 C. W. N. 184.

In this case, the accused who were charged with rioting were acquitted by a Deputy Magistrate, and on an application being made to the High Court by the complainant a Rule was issued on the accused to show cause why the order of acquittal should not be set aside. The Rule came on for hearing before the Chief Justice and Teunon, J., who differed in opinion. The case was then referred to Fletcher, J.

It was held by Jenkins, C. J., and Fletcher, J., that the High Court has jurisdiction under sec. 439, Cr. P. C., to interfere in revision with an acquittal, but it should ordinarily exercise this jurisdiction sparingly and only when it is urgently demanded in the interests of public justice, and applications for such purpose filed at the instance of private persons should be discouraged on public grounds.

Reviews

THE DOCTRINE OF CONSIDERATION, treated historically and comparatively. *By Pherozeshah N. Darurala LL.D. (London), B.A., LL.B. (Bombay). Butterworth & Co., Calcutta, Sydney, Winnipeg and London. 1914.*

The author of this treatise in as advocate of the Bombay High Court and the book which is the most exhaustive and erudite treatment of the subject in English language is dedicated to Sir Basil Scott, Chief Justice of Bombay, and is ushered in by a "Foreword" from another learned Judge of the same Court, Mr Justice Beaman. There is hardly anything a reviewer may say on the merits of the work which can come up to the deservingly high encomiums pronounced on it by Mr. Justice Beaman. Undoubtedly "the jurist, the student of comparative law, the philosophical analyst of legal notions will accord it a warm welcome, and find in its crowded pages remarkable treasures of out-of-the-way knowledge, a very fascinating and complete exposition of the origin and growth of our present doctrine of consideration, conscientiously worked out in the light of history and comparative jurisprudence." But the learned Judge's apprehensions, that "the professional advocate may lay aside Dr. Daruvala's book with a sigh and a sneer declaring it to be altogether unpractical and of no use for the immediate purposes of forensic arguments" will, we venture to hope, prove groundless, and we are confident that the book, which by no means overlooks the practical requirements of the professional lawyer, will secure a firm footing in his bookshelf, even when, as he very seldom can afford to be, he is not a jurist, a student of comparative law or a philosophical analyst of legal notions. We would not be so rash as to foretell that the book will actually develop the proverbial dog's ears which will tell all their own eloquent tale—the very strong and heavy covers with which it is endowed introduce a disturbing factor in our calculations. But approaching the matter from the standpoint of the practical lawyer, we cannot overlook the fact that the English law of consideration has not been adopted in its integrity in the Indian system—the Indian Contract Act has in fact engrafted such revolutionary heresies upon the purely English notion of consideration, that no Indian lawyer can adequately understand and apply the rules laid down in the Indian statute if he were to approach it from the traditional point of view of the English lawyer. And yet the fundamental ideas of the English doctrine run through the Indian law. Hence the necessity in the case of Indian lawyers individually for a critical examination of the English doctrine with its ramifications. The Indian lawyer moreover is not so wedded to English traditions, that while appreciating its merits, he cannot discern its defects. Even in England, the doctrine of consideration shows signs not indeed of breaking up but of slow but far-reaching readjustments. Sir William Markby's onslaughts on the English doctrine indeed found readier appreciation from the Indian readers of his treatise on "The Elements of Law," than they did from the learned amongst his own countrymen, and in fact we are not surprised that the most searchi

exhaustive examination to which the doctrine has been yet subjected should come from an Indian.

It is also not surprising that Mr. Daruvala should not rest satisfied with a comparative study of the English and the Indian systems and the English and the Roman systems only. Given his scholarship, his love of research and keen analytical powers, an Indian could hardly stop short at a point where most English scholars would have cried enough. But we doubt whether any of his own countrymen besides himself would have the courage and the industry to push his comparative enquiry to the limits which Mr. Daruvala has reached, for they embrace Roman, Dutch, French, Belgian, Portuguese, Spanish, German, Austrian, Russian, Chinese, Japanese, Jewish, Ottoman and Babylonian systems. Even this list is not exhaustive, for we have not mentioned the Spanish American Republics and of several English Colonies and dependencies. The rules of Hindu and Mahomedan law, such as they were and are, too, have received their due share of attention. So far, therefore, from laying aside the book with a sigh and sneer, our outstanding feeling, as we do so, is one of wonder and admiration. We need only add that Dr. Daruvala's treatment of the early legal history of the English doctrine is not only interesting, but should be invaluable to students of English legal history.

INDIAN CASE LAW ON EJECTMENT, containing the laws and rulings relating to suits for recovery of immoveable property. *By Lalmohan Mukhopadhaya, B.L., Pleader, Judge's Court, Howrah. Second Edition. Vol. I. Publishers: The Weekly Notes Office: R. Cambray & Co.: M. C. Sircar & Sons, Calcutta. Price Rs. 6.*

This work first appeared under its unpretentious title in 1909. Its scope was more or less confined to suits by landlords of agricultural holdings to eject their tenants or trespassers or other persons in possession of the holding without a legal title. The title "Ejectment," however, covers a far wider field, and, perhaps realising this, the author, instead of limiting the title to suit the contents, has in the present edition sought to amplify and expand the contents so that they may correspond with the title, and in accomplishing this task, the author has brought to bear upon it quite an astonishing amount of industry. Some idea of the extended field covered by the present edition may be formed when it is remembered that whereas the first edition took up only about five hundred odd pages in all, the first volume alone of the present edition (the volume under notice) has spread beyond a thousand and ninety. The matter dealt with in this volume is disposed of in four parts. The first deals with various questions of pleadings and procedure, including the question as to whether the special rent-laws or the general provisions of the Transfer of Property Act should apply, the right to sue in ejectment, jurisdiction, court-fee, parties, limitation, etc. As adverse possession is frequently set up in defence in ejectment suits, a chapter of nearly a hundred pages is devoted to this question, whilst over 30 pages are given to injunctions in ejectment suits. Part II after dealing in two chapters with the general law bearing on the relationship of landlord and tenant (in the course of which incidentally the position of a trespasser is distinguished and defined) takes up the different kinds of tenants and tenants' rights in Bengal, Chota Nagpur, Madras, the United Provinces, the Punjab, Oudh, Central Provinces and Bombay. A chapter is given to a consideration of the various kinds of tenancies, from permanent tenancies downward to tenancies at will (joint tenancies and tenancies in common also come in here), and another to the subject of subdivision of holdings in Bengal and elsewhere, and a third to the proof of the nature and character of tenancy. As transfers of non-transferable tenants' rights generally give rise to an action in ejectment of the transferee by the landlord, this subject of transfer of tenants' rights is exhaustively dealt with in 10 chapters covering about 150 pages province by province from Bengal to Bombay and the Punjab and Oudh to Madras. Part III is entirely devoted to a treatment of the various aspects of the general law of landlords and tenants. It is in fact a book by itself of over 250 pages. Part IV deals with termination of the relationship of landlord and tenant, and the law of merger. Although, as the title implies, the book professes to be a compilation of case law, every attempt has been made to classify and arrange the materials into logically connected groups, and the marginal notes to the paragraphs add further facilities for reference.

The scope of the work has been extended not only to cover all classes of suits in ejectment and all aspects of this class of litigation, but also so as to embrace all the different systems

of special laws prevailing in different parts of India. We are sure that the conscientious labour which the author has expended in preparing the present edition will not go unappreciated.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before N. R. CHATTERJEA and GREAVES, JJ. APPEAL FROM APPELLATE DECREE No. 157 OF 1913. RASUL MAHMUD BEPARI, Defendant, Appellant *v.* ABUL FAZAL CHOWDHURI AND OTHERS, Plaintiffs, Respondents. Heard, 25th November, 7th December. Judgment, 8th December 1914.

Bengal Tenancy Act (VIII of 1885), secs. 20, 29 (b)—Enhancement—Presumption.

The appeal arose out of a suit for rent. Plaintiff claimed rent at the rate of Rs. 44-14. The defence was that the rent payable was Rs. 32-1. The rent was enhanced in 1892 from Rs. 32-4 to Rs. 39-12 and subsequently to Rs. 44-14. The lower Appellate Court held that the Plaintiff could not recover rent at the rate of Rs. 44-14, but decreed rent at the rate of Rs. 39-12.

The *jama* of Rs. 32-4 consisted of several smaller *jamas*. One of them bore a rental of Rs. 17-8 and was held under a *kabuliyat*, dated Chait 1288. That *jama* together with four others were consolidated into one *jama* of Rs. 32-4, and the rent was enhanced in 1299 to Rs. 39-12. It was stated in the *kabuliyat* that the Defendant was in occupation of the holding bearing a rental of Rs. 17-8 from before the date of the *kabuliyat*.

Held, that the question to be decided was not whether the Defendant was at the time of institution of suit in possession of the land for 12 years, but whether at the date of enhancement, namely in 1892, he was in possession for over 12 years.

Under sub-sec. (2) of sec. 20 of the Bengal Tenancy Act there was a presumption that the Defendant had held the land for 12 years.

Babu [illegible]ebendra Nath Bagchi for the Appellant.

Babu Bepin Behari Ghose (Sr.) for the Respondents.

A. T. M. *Appeal allowed: case remanded.*

CIVIL APPELLATE JURISDICTION. Before HOLMWOOD and CARNDUFF, JJ. APPEALS FROM APPELLATE DECREES Nos. 1224 AND 1352 TO 1355 OF 1911. RAJA JYOTI PROSAD SINHA DEO, Defendant, Appellant *v.* GORA CHAND PATAKH AND OTHERS (Plaintiffs) and SRINATH MAJHI AND OTHERS (Remaining Defendants), Respondents. 4th December 1914.

Suit, maintainability of—Limitation—Rent Recovery Act (X of 1859), sec. 77.

The Plaintiffs sued virtually for declaration of their title to *Kheraji Brahmottar* right with confirmation of possession. The defence was that the suits were barred by limitation as they had not been brought within one year from the date of the decision of the appeal in the rent suits, as provided for in sec. 77 of the Rent Recovery Act (X of 1859) and the Plaintiffs had no right to the rent payable by the tenant Defendants.

The Plaintiffs prayed that their right to recover rent from the tenant Defendants might be declared after establishment of their title to the lands held by those tenants. The Plaintiffs did not pray for setting aside the decrees on the ground of fraud or for recovery of the rent due to them during the years 1310 to 1312. These suits were brought under sec. 42 of the Specific Relief Act. Their cause of action arose from the date the rent-suits were dismissed.

Held, that such a suit could not be prevented by reason of the provisions of sec. 77 of the Rent Recovery Act.

Hari Nath Roy v. *Shristeedhar Das* (7 W R.), followed.

Babus Lalit Mohan Ghose and *Sris Chandra Dey* for the Appellant.

Babus Provas Chandra Mitter, Sasadhar Roy and *Harendra Krishna Mukherjee* for the Respondents.

A. T. M. *Appeals dismissed.*

[PRIVY COUNCIL.]

[APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES.]

LORD DUNEDIN. LORD SHAW. SIR JOHN EDGE. MR. AMEER ALI. 1914, Heard, 21 and 22, October. Judgment, 22, October.	SETH RAMLAL, since deceased (now represented by Seth Sheolal) and another, Appellants, *v.* NARSINGDAS, since deceased, and ors., Respondents.

Partnership, dissolution of—Partition, suit for—Dispute as to whether a mortgage bound one or both partners—Compromise admitting debt to be in part payable by each—Suit by mortgagee decreed against one partner only—Other partner if relieved from paying his admitted share of debt—Payment of whole debt by other partner—Contribution.

Following on a dissolution of partnership between L and B, L sued B for partition, and one of the questions in dispute was whether a mortgage of the partnership property by B in favour of N was payable by B alone or by both partners equally. A decree was passed on compromise by which L undertook to pay Rs. 8,200 to the mortgagee and B that he should free L's portion of the property from the mortgage. L paid only Rs. 200 to N, who thereafter to enforce his mortgage brought a suit in which it was eventually decided that the mortgage bound only B's share, and N was paid off by sale of B's share. B's representatives then sued L for Rs. 8,000.

Held—*That by the compromise L admitted that the debt due to N was a partnership debt whereof L was liable to pay Rs. 8,200, and from that moment Rs. 8,200 became a debt due by L to N for the purpose of adjustment between the ex-partners; and it was not open to L's representatives to get out of the compromise by which L was bound, by saying that if N's suit had been then decided, L would have found himself free of the liability without entering into the undertaking to pay Rs. 8,200. B having had to pay what L should have, to make good the terms of the compromise L was bound to pay it to B.*

This was an appeal from a judgment and decree, dated 30th April 1908, of the Judicial Commissioner, Central Provinces (Mr. H. J. Stanyon), which in effect affirmed a decree of the Court of the first instance.

The facts of the case sufficiently appear from their Lordships' judgment. The terms of the compromise therein referred to as appearing at p. 29 of the Record were as follows :—

"Plaintiff to pay Rs. 8,200 (to Narsingdas), and Defendant should obtain redemption from mortgage of any property which by this division has fallen to Plaintiff's share and which he (Defendant) may have mortgaged with the said Narsingdas. If Defendant should fail to do so, then the property under mortgage and the Defendant will be responsible to the Plaintiff for the money, Rs. 8,200."

The Judicial Commissioner delivered the following judgment :—

An ingenious argument was put forward in support of the Appeal, raising the two questions, (1) of the Plaintiffs' right to sue, and (2) of the time barrier.

It was said that, taking the compromise as one which made the Defendants liable to pay Narsingdas, it did not import a contingent contract to pay to the Plaintiffs if Narsingdas was not paid. Regarding the suit as one for contribution under Chapter V of the Indian Contract Act, that chapter was confined to rights arising out of *quasi*-contracts. But where, as here, there was an express agreement, the chapter had no application at all. The money which the Plaintiffs had paid to Narsingdas was not money paid to the use of the Defendants at all. The previous litigation had exonerated the Defendants from all liability to Narsingdas, and Defendants were relieved of nothing by the payment which Plaintiffs made after that litigation had come to an end. In this connection reference was made to the English cases of *Spencer* v. *Parry* (1), *Lubbock* v. *Tribe* (2), *Bonner* v. *Tottenham and Edmonton Permanent*

(1) 3 A. & E. 331 (1835).
(2) 3 M. and W. 607 (1838).

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Investment Building Society (3), and the Indian case of *Pindiprolu Sooraparaju* v. *Pindiprolu Veerabhadrudu* (4). Upon all these grounds it was contended that there could be no suit for contribution towards the payment made by Plaintiffs to Narsingdas, on the basis of any liability of Defendants to the payee. Therefore, it was urged, the Rs. 8,200 payable under the compromise could only be enforced as a contract with Bhajanlal, and, without disputing the correctness of the order refusing relief in execution, it still followed that Bhajanlal's (and through him Plaintiff's) cause of action arose, either on the day after the contract, or at any rate, when the Defendants refused to pay Bhajanlal and drove him to execute the decree. As a suit based on the agreement and that was the only suit which could be brought - the present suit was long time-barred.

I have given careful consideration to these arguments, in the light of what was said on the other side, and I am of opinion that though sound in principle, they are unsound in the application thereof to this case. To begin with, I am very clear that if the stipulation for payment of Rs. 8,200 contained in the compromise decree was one under which Bhajanlal could recover the money from Defendants and pay it to Narsingdas, then such recovery was only obtainable by execution of the decree and not by separate suit, by reason of the provisions of sec. 244 of the Code of Civil Procedure, 1882 But in execution proceedings *inter partes* there is a final order by the Court which passed the decree, interpreting that stipulation as one whereby the present Defendants became bound to Bhajanlal to pay Rs. 8,200 to Narsingdas, and Bhajanlal could not compel them to pay that money to himself. Whether this interpretation was right or wrong, it was an interpretation claimed by the Defendants, and must be regarded as a *res judicata* by virtue of the order. It is clear that this view of the clause was one in the interests of the Defendants. At that time they had, in a valid compromise between themselves and Bhajanlal, accepted liability for payment of a certain share of an existing mortgage debt by property belonging to both parties was considered to be incumbered, and therefore in the scheme for joint redemption of the whole property, it was to the interest of the Defendants to see that their share of the payment reached the mortgagee. For this reason they undertook to make the payment direct. Therefore, neither under the decree nor by suit could Bhajanlal have claimed payment to himself in original. No time being fixed, the joint redemption which the compromising parties undertook to make stood open for performance until the date of foreclosure, that is, while redemption remained possible. Bhajanlal had no cause of action against his co-mortgagors by compromise until that period was past. I therefore concur with the lower Court in the view that the present suit is not barred by time.

Then, as regards the right of the Plaintiffs to bring this suit. It is necessary, treating the suit as one for contribution in order to support the action, that the money sought to have been recovered should have been paid *to the use* of the Defendants. And therefore if A, by agreement with B, bind himself to pay either to B or to a third party a sum of money which B is primarily liable to pay, and B is afterwards called upon to pay and does pay such sum, his only remedy against A is on the special agreement. For, the money so paid by B, having been paid in discharge of his own liability, was not money paid to the use of A. This is the principle upon which the argument for the Appellants is based, and it is a sound principle supported by the Engilsh cases already cited. But it has not, in my opinion, been correctly applied to the facts of this case. We must look at the agreement from the positions and points of view of the parties *on the date when it was made*, and not in the light of subsequent events. If, on that date, the mortgage debt had been regarded as the primary liability of Bhajanlal, of which, for some consideration, the Defendants undertook to pay Rs. 8,200 then the principle would have been fully applicable, and the above illustration would have been exactly in point. But the mortgage debt was not so regarded. It was a disputed point as to whether Bhajanlal should pay all or only half of it, and that dispute was compromised by an agreement which necessarily admitted that it was a

(3) [1899] 1 Q. B 161.

(4) I. L. R. 30 Mad. 486 (1907).

Babu Bep... Respondents.

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partnership debt, whereof Defendants on that date were liable to pay Rs. 8,200. From that moment the Rs. 8,200 became a debt due by Defendants to Narsingdas for the purpose of adjustment between the ex-partners of the dissolved partnership. Narsingdas was not privy to this arrangement, and he could no more sue, than he could be sued, upon it. But that did not affect its validity as between the parties to it. It did not entail upon Defendants the payment of any money to Bhajanlal himself, but it did entail upon them the performance of an act, namely, the payment of money to a third party to whom, for the purposes of the parties *inter se*, the Defendants alone became responsible to pay Rs. 8,200. In other words, by a perfectly valid compromise, two persons, who had accepted the position of joint debtors, converted themselves, *inter se*, and without privity of the creditor, into debtors-in-common, with specified shares in the liability. Performance of the act of payment to the creditor could not be enforced by the co-debtor either by execution or by suit The only remedy of the latter lay in a suit for contribution or damages if the act was not performed. In *Brittain* v. *Lloyd* (5), it was laid down that the action for money paid is maintainable in every case in which there has been a payment of money by the Plaintiff to a third party, at the request, express or implied, of the Defendant, and with an understanding, express or implied, on his part to repay it, and that it is immaterial whether the Defendant is relieved from a liability by the payment or not. It is an established principle that, where the Plaintiff is *compelled* to pay the Defendant's debt, in consequence of his neglect or omission to do so, the law infers that the Defendant requested the Plaintiff to make the payment for him, and gives him the action for money paid [*Edmunds* v. *Wallingford* (6)]. The right to indemnity in these cases exists, although there may be no agreement to indemnify, and although there may be, in that sense, no privity between the Plaintiff and the Defendant. In the view I take, for the purposes of the rights of the parties *inter se*, the Rs. 8,200 became, by the compromise a debt due by the Defendant to a third person. Plaintiffs were compelled to pay that debt by force of the contract with the creditor, and Defendants were exonerated from responsibility *under that contract.* This merely placed them beyond the power of the creditors to enforce payment by suit. But it did not relieve them of the obligation imposed by the compromise to make that payment voluntarily, and when, eventually, they failed to make it, and Plaintiffs had to perform their share of the compromise as well as their own, the default or breach occurred which gave rise to the cause of action whereon the present suit is based. I am, therefore, of opinion that the suit as framed is maitainable.

As I have already stated, the compromise on the mortgage liability to Narsingdas was an agreement to convert what was believed to be, or accepted as, a joint debt into two fractions of which Defendants' share on the date of the agreement was fixed at Rs. 8,200. Both parties were to pay Narsingdas and redeem. Had Defendants proved that they were ready and willing to pay their share, but could not pay owing to Bhajanlal's failure to pay his share, no claim for interest could have been maintained against them. But I have already expressed my concurrence with the lower Court in holding that no tender of payment was made The debtors-in-common seem to have concurred in allowing the mortgage to run on. Defendants refused to pay Bhajanlal, but they did not refuse to perform the act of paying Narsingdas; on the contrary, they asserted their right to make the payment to him only Hence there was no refusal of performance which gave Bhajanlal any cause of action. During this period of drifting, interest continued to mount up on the shares payable to both parties of the compromise, and each became further liable to relieve the other to the extent of the interest proportionate to his share. Therefore, Defendants were rightly held liable for interest at the mortgage contract rate on the unpaid Rs. 8,000 up to the date when Plaintiffs were compelled to pay for them. The subsequent interest was a matter within the discretion of the lower Court, and with that discretion I should not interfere except on very good grounds. No such grounds are disclosed. Moreover, I am of opinion that

(5) 14 M and W. 762, 773 (184-).
(6) 14 Q B. D. 811 C. A. (1886).

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the discretion has been very properly exercised, in accordance with the demands of equity and good conscience."

Hence this appeal.

Mr. L. DeGruyther, K. C. (with him *Mr. J. M. Parikh*) for the Appellants submitted that the Plaintiffs had no cause of action against them. The money which the Plaintiffs had paid to Narsingdas was not money paid to the use of the Defendants at all. The Defendants had been exonerated of all liability by the judgment of the Privy Council in the previous litigation. The Plaintiffs were not entitled to any contribution from the Defendants. In any case the present suit filed in July 1906 was barred by limitation. The Defendants refused to pay in the lifetime of Bhajanlal who died in 1896, and when the cause of action had already accrued The sale of Plaintiffs' villages which took place on 7th April 1905, and the receipt, dated the 19th April 1905, given by Narsingdas gave no cause of action against the Defendants. At all events the Defendants were not liable to pay interest

Sir Erle Richards, K. C., and *Mr. G. R Lowndes* for the Respondents were not heard.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—The claim in the present suit arises out of the following circumstances :—

Two parties were interested in property which they held in partnership, and one of them, called Lakmichand, brought a partition suit against his partner Bhajanlal, following on a dissolution of the partnership in which the Court gave effect to a compromise which the two parties themselves had effected. The judgment which was pronounced by the Court in that case is to be found at page 29 of the Record. There had been a mortgage granted by Bhajanlal in favour of a person called Narsingdas, and that mortgage purported to convey, as security for the debt which was thereby constituted, the whole of the partnership property.

It was a moot point, however, between the partners as to whether the partner who executed that mortgage had in truth any right to subject the whole of the partnership property to the debt, or whether he was not in fact only able to burden his own share. This being so, one of the terms of the arrangement which was made binding between the parties in the judgment pronounced was that the Plaintiff, who is now represented by the present Defendants and Appellants, should pay to Narsingdas, that is, in other words, to the mortgagee, Rs. 8,200 and that the Defendant Bhajanlal who is now represented by the present Plaintiffs and Respondents, should free the other parties' portion of the property from the mortgage.

It is admitted that the Defendants, that is to say, the present Appellants, never did pay the Rs. 8,200 except to the small extent of Rs. 200, to Narsingdas. Narsingdas thereafter brought a suit to make good his mortgage, and in the course of that suit it was found eventually by the highest Court, by this Board, that truly the mortgage only bound Bhajanlal's share and not the whole partnership property.

Payment to the mortgagee Narsingdas was effected by the sale under that suit of Bhajanlal's property, and the result, of course, was that he had to pay the whole of Narsingdas' debt. Inasmuch as the present Appellants had never paid the Rs. 8,200 to Narsingdas, it is quite evident that Bhajanlal had to pay Rs. 8,000 more to Narsingdas than he should have paid. Accordingily the present Respondents sue for contribution.

The defence really comes to this, that

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the payment which is stipulated for in the judgment which was the result of the compromise is a payment which is conditional upon the other party doing his share. It is said that Bhajanlal never did free the other part of the property from the mortgage because that was freed not by anything done by him, but by the judgment of the Privy Council in the suit which has already been mentioned.

Their Lordships are of opinion that the case is quite correctly put by the learned Judicial Commissioner from whose judgment the present Appeal lies. Speaking of the mortgage debt due to Narsingdas, he says: "It was a disputed point as to whether Bhajanlal should pay all or only half of it, and that dispute was compromised by an agreement which necessarily admitted that it was a partnership debt whereof the Defendants (in this suit) on that date were liable to pay Rs. 8,200. From that moment the Rs. 8,200 became a debt due by the Defendants to Narsingdas for the purpose of adjustment between the ex-partners of the dissolved partnership."

Their Lordships think that that is the true key to the case, and that it is out of the question now for the present Appellants to try to get out of the compromise by saying that if the Privy Council case had been then decided they would have found themselves free of the liability without entering into the undertaking to pay Rs. 8,200. They are bound by that compromise, however foolish it may have been. They might have paid the money direct to Narsingdas; they did not pay it, and the Respondents had in consequence to pay it to him. Accordingly, to make good the terms of the compromise, the Appellants must now pay it to the Respondents.

Their Lordships will accordingly humbly advise His Majesty to dismiss the Appeal with costs.

Mr. Edward Dalgado, Solicitor, for the Appellants.

Messrs. Downer and *Johnson*, Solicitors, for the Respondents.

B. D. *Appeal dismissed with costs.*

PRIVY COUNCIL

[APPEAL FROM ALLAHABAD.]

LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI
1914,
23, October.

JHANDU, Appellant,
v.
TARIF, since deceased, and ors., Respondents.

Pleadings—Change of case—Suit by Hindu reversionary heir to recover from person, alleged to be not deceased owner's legal widow, dismissed for failure to prove relationship—Alienation by widow—Subsequent suit by remoter reversioner against alienee on same allegations—Maintainability—Suit if may be allowed to be converted into a suit for declaring alienation without necessity—Remoter reversioner's right to bring such suit

Several persons alleging to be heirs of a Hindu, S, (one of them being M), sued to recover S's property from I, who had taken possession of it as his widow, denying that she was S's legal widow. The suit was dismissed on account of Plaintiffs' failure to produce a proper pedigree showing that they were in the degree of relationship which would entitle them to succeed. I then alienated the property. The present Plaintiff brought this suit to recover the property from the transferee as heir of S and like M denied that I was the real widow of S. The Plaintiff being however in relationship one degree more remote from S than M, the High Court dismissed the suit on the ground that M would cut him out. On appeal to the Judicial Committee it was in effect conceded that I was the real widow, but the alienation to the Defendant was attacked as being in excess of

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her authority and inoperative beyond her life and a declaration was sought to that effect :

Held—*That the relief sought for could not be spelt out of the pleadings at all.*

That the Plaintiff was not the presumptive reversionary heir and M who appeared to be such heir had not precluded himself from suing by his failure in the previous suit, inasmuch as the conveyance which was challenged had not come into existence at the time of that suit.

RANI ANUND KOER v. THE COURT OF WARDS (1), *referred to.*

This was an appeal from a judgment of the Allahabad High Court (Saiyid Karamat Husain and E. M. D. Chamier, JJ.), dated the 8th June 1911.

In his plaint the Plaintiff, Appellant, alleged that he was the heir of one Sukhram Jat, who died in 1903, that his kept mistress Musammat Imirti, who lived with him, unlawfully took possession of his immoveable property, and that she transferred that property to the Defendants. The Plaintiff asked for a decree for possession and claimed in the alternative that in case Musammat Imirti were found to be the lawful wife of the deceased, according to the Karao form of marriage, the said alienations of the property be declared "void and ineffectual as against the Plaintiff who is the rightful person."

The Additional Subordinate Judge of Meerut who tried the suit found that the said Musammat Imirti was only a mistress and not the wife of the said Sukhram. He also found that one Mir Singh was one degree nearer in relationship to the said deceased than the Plaintiff, and that the said Mir Singh was alive at the date of the suit. Nevertheless, he held that the Plaintiff, being a remote reversioner, was entitled to maintain the suit and he accordingly allowed the Plaintiff's claim and made a decree for possession in his favour.

On appeal the High Court set aside that decree. The learned Judges of the High Court held that in the presence of Mir Singh, who was admittedly alive, the Plaintiff could have no right to the property of Sukhram. They did not record any finding as to whether Musammat Imirti was a lawful wife of Sukhram or not. They held that the only person who could inherit Sukhram's property was Mir Singh, who brought his suit and failed. They accordingly dismissed the Plaintiff's suit.

Hence this appeal.

Mr. Bhugwandin Dubé for the Appellant submitted that if Musammat Imirti were the lawful wife of Sukhram, as was contended by the Defendants, the Plaintiff, although a remote reversioner, was entitled to maintain a suit for a declaration that the alienation in question was made without legal necessity and was therefore void beyond the widow's lifetime. The next reversioner, Mir Singh, had precluded himself from suing by reason of a suit instituted by him in 1905 upon allegations exactly similar to the present. That suit was dismissed on the ground that Mir Singh had failed to establish his relationship to Sukhram.

Reference was made to *Rani Anund Koer* v. *The Court of Wards* (1), *Jhula* v. *Kanta Prasad* (2), *Govinda Pillai* v. *Thayammal* (3).

Musammat Imirti being alive, the Plaintiff was not entitled to a decree for possession which had been given to him by the Subordinate Judge, but the relief for a

(1) L. R. 8 I. A. 14, 23 (1882).

(1) L. R. 8 I. A. 14, 23 (1882).
(2) I. L. R. 9 All. 441 (1887).
(3) I. L. R. 28 Mad. 57 (1904).

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declaratory decree claimed by him in the alternative ought to be given to him.

Mr. J. M. Parikh, Counsel for the Respondent, was not heard.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—One Sukhram was an owner of property and died. He left behind him a lady named Musammat Imirti, who was supposed to be his legal widow, having been married in the Karao form of marriage. If she was his legal widow she was entitled to the life enjoyment of the property which Sukhram left.

In 1901 four persons called Kehri, Kallu, Nihal, and Mir Singh raised an action against this lady alleging that they were the representatives of Sukhram. They further alleged that she was not a legal widow at all, and that accordingly they were entitled to possession of Sukhram's property. They were cast in that action, because they failed to produce a proper pedigree which showed that they were in the degree of relationship which would entitle them to succeed even if their allegations against the lady were true.

The present Plaintiff is a person of the name of Jhandu who, admittedly, in the pedigree is one degree further off from Sukhram than Mir Singh, who is still alive. He raised the present action on precisely the same averments as Mir Singh and the others raised in their action in 1901, that is to say, he averred that Musammat Imirti was not a real widow, but was, as he described it, a Bhatni widow with whom Sukhram had illicit connection and who lived with him as a kept woman. He therefore asked for possession of the property. It seems that after 1901, but before the institution of the present suit, Musammat Imirti made a conveyance of part of the lands to certain third parties. The Subordinate Judge gave judgment in the Plaintiff's favour, disregarding the fact that in no supposition could the Plaintiff ever be entitled to immediate possession for which he asked, owing to the fact that Mir Singh was still alive and was a degree nearer than the Plaintiff.

The High Court set aside that judgment and dismissed the suit holding that it was impossible for the Plaintiff to get what he asked, because, in any event, Mir Singh, under the present circumstances, would cut him out.

An appeal has been taken to their Lordships' Board, and the learned Counsel for the Appellant really gave up at once any idea of insisting on the relief which the Plaintiff asked for and which he got from the Subordinate Judge, because he admitted that the widow being alive he could not possibly get possession. That of course is tantamount to an admission that she is a real widow and not, as put in the plaint, a kept woman. But he has pressed their Lordships to turn the pleadings round and to give him a declaration that this conveyance by the widow to these third persons was bad as an absolute conveyance, and was only given as for the period of her own life.

Now it is the fact that a reversioner in India may have a declaration from a Court to the effect that a conveyance by the person presently in possession is only good for the life of that person and is not good as an absolute conveyance of the property against the reversioners. But it is perfectly well settled that that declaration will only be given to persons who stand in a certain relationship. It was laid down by this Board in the case which has been quoted of *Rani Anund Koer* v. *The Court of Wards* (1), "that the right to bring such a suit is limited, and, as a general

(1) L. R. 8 I. A. 14, 23 (1882).

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rule, belongs to the presumptive reversionary heir." It is quite true that the Board indicated that, in certain cases, the nearest reversionary heir might have precluded himself in some way by his own act or conduct from suing—as by collusive action with the widow—and in that case a reversioner in a more remote degree might be allowed to prosecute the suit. The argument that was addressed to the Board was that this was such a case, because Mir Singh having brought the suit in 1904, and failed through producing a false pedigree, he never could sue again.

There are two reasons either of which is sufficient to prevent that argument prevailing. The first has already been indicated, namely, that the relief asked for here was possession of the property, and that the declaration now sought for can scarcely be spelt out of the pleadings at all. But there is another objection which is equally fatal, and it is this. In 1904, when Mir Singh brought his suit, this deed of conveyance by the widow was not in existence, and therefore it is impossible to say that Mir Singh has, by his conduct in raising an action in 1904, precluded himself from challenging by way of declaration the deed which at that time was not in existence.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

Solicitors: *Messrs. Barfield* and *Barfield* for the Appellant.

Solicitor: *Mr Edward Dalgado* for the Respondent.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 398 OF 1913.
WITH
RULE No. 1250 OF 1913.

STEPHEN, J.
MULLICK, J.
1913,
Heard, 25,
November, and
12, December.
1914,
Judgment,
29, January.

THAKUR MADAN MOHAN NATH SAHI DEO,
Judgment-debtor,
Objector-Appellant,
v.
MAHARAJA PRATAP UDAI NATH SAHI DEO,
Decree-holder,
Respondent.

Chota Nagpur Landlord and Tenant Procedure Act (I of 1879, B. C.), sec. 47—Bengal Rent Recovery Act (VIII of 1865, B. C.), sec. 5—Suit for rent—Plaint not specifying property in arrears—Tenure if may be sold without amending plaint—Order of High Court to amend plaint, if under Civil Procedure Code (Act V of 1908), Or. VI, r. 18—Decree, if should be amended—Remand order directing trial by specific Court—Another Court having jurisdiction if may try

Where in a suit for rent governed by the Chota Nagpur Landlord and Tenant Procedure Act of 1879 the plaint did not specify correctly the property in respect of which the rent was due as required by sec. 47 of the Act, and the sale proclamation issued in execution of the decree passed in the suit (which by force of sec. 5 of the Bengal Rent Recovery Act of 1865 would specify the property in the words of the plaint) was in consequence found to be defective by the High Court on an appeal preferred to it in execution proceedings and the High Court by its order, dated 13th March 1913, acting on the agreement of the parties directed that the description in the plaint should be amended, the Plaintiff being given liberty to submit a correct description, and further that the "Court that tried the original suit" should adjudicate upon the matter in case of controversy; but on remand, the Deputy Commissioner, and

not the Deputy Collector who tried the original suit, caused the plaint to be amended on the 17th May 1913 :

Held—*That r. 18 of Or. 6 of the Civil Procedure Code did not apply to the matter as the order of the High Court directing amendment was not made under Or. 6, but under the power of the Court to order that certain steps should be taken by the parties to enable the differences between them to be properly settled, and the amendment made was not out of time.*

That although the Deputy Commissioner had general jurisdiction over the case under the High Court's order the Deputy Collector and not he had power to deal with the matter and his order should be set aside.

That the objection on the part of the judgment-debtor that it was the decree and not the plaint that was to be amended, though it would have been a valid objection if the case was under the general law, under the special provisions of sec. 5 of the Rent Recovery Act there was no necessity for amending the decree.

This was an appeal preferred on the 18th of August 1913 against the order of A. E. Scroope, Esq., Deputy Commissioner of Ranchi, dated the 26th of June 1913.

The material facts will appear from the judgment.

Mr. S. P. Sinha, with *Babus Biraj Mohan Majumdar* and *Bipin Chandra Mullick* for the Appellant.

Dr. Rash Behari Ghose and *Babu Jogesh Chunder De* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

We have before us an appeal from an order and a rule which have arisen under the following circumstances. The Respondent who is also the Opposite Party in the Rule obtained a decree for rent against the Appellant, Petitioner, on the 19th April 1905, under the Chota Nagpur Tenancy Act of 1879. After prolonged litigation he obtained an order from the Deputy Collector of Ranchi, dated the 2nd September 1912, that certain villages should be sold in execution of his decree. On appeal to this Court it was decided that an appeal lay, and that the plaint did not specify correctly the property in respect of which rent was due, as it should have done according to sec. 47 of the Chota Nagpur Landlord and Tenant Procedure Act of 1879. The result was that the sale proclamation, which, if correctly drawn up, would, by force of sec. 5 of the Bengal Rent Recovery Act of 1865, specify the village, etc., in which the lands were situated in the words of the plaint, would properly be defective. This Court accordingly set aside the order before it in which the provisions of the Rent Recovery Act had not been observed, and acting on an agreement between the parties directed that the description in the plaint should be amended, and ordered that after such amendment had taken place the sale proclamation should be drawn up afresh. The case was "remitted to the Court that tried the original suit" : the Plaintiff was to be "at liberty to submit a correct description of the tenure" : if there was any controversy as to the accuracy of the description the Court was to adjudicate upon the matter.* The case was accordingly remitted to the Deputy Commissioner of Ranchi, who overruled an objection that the High Court had no jurisdiction to make the order we have quoted, allowed the amendment of the plaint, and left it to the decree-holder to take further steps.

* See *Madan Mohan v. Protap Udai Nath*, 16 C. W. N. 1024 (1912).

An appeal has been filed against this order which is supported on four grounds.

In the first place it is said that there has been no adjudication on the correctness of the description furnished by the decree-holder of the property in respect of which execution is sought. We have carefully considered the terms of the order and the observation furnished to us by the Judge from this point of view, but it is not necessary that we should now adjudicate on it. The second ground is that the application for amendment was made to the Deputy Commissioner by whom the amendment was ordered, whereas the order of this Court was that the case was remitted to the Court which tried the original suit, that is the Deputy Collector. The result is that the order of this Court has not been obeyed, and whatever may have been the general jurisdiction of the Deputy Commissioner he had no power to deal with this particular matter except by remitting the case to the Deputy Collector. This objection is therefore valid. The third ground is that the application for the amendment of the plaint is out of time by force of Or. 6, r. 28, which provides that when an order for amendment of the pleadings in a suit is made and no time is limited by the order for that purpose, the amendment must be made within fourteen days of the order. Here no time is so limited by the order of this Court and the plaint was not amended until 17th May 1913, while the order that it should be amended was made on the 13th March 1913. This argument however fails, as the order of this Court was not made under Or. 6 but under the power of the Court to order that certain steps should be taken by the parties to enable the differences between them to be properly settled.

The fourth ground is that it is of no avail to amend the plaint if the decree is not amended as it is the decree and not the plaint that is to be executed. This would be so, were the case one under the general law; but this case falls within the scope of sec. 5 of the Rent Recovery Act already referred to, and, therefore, apart from the order of this Court, the validity of which cannot be questioned, there is no necessity for an amendment of the decree. The result is that the order of the Court below must be set aside and this case must go back, in the words of this Court on a former occasion, to the Court which tried the original suit, that is, to the Deputy Collector of Ranchi, in order that he may act in accordance with the previous order of this Court. Any application that is made before him for amendment of the plaint must be made without undue delay; but will not be subject to Or. 6, r. 28. For purposes of execution it is not necessary that an amendment should be made in the decree to correspond to that made in the plaint.

The Deputy Commissioner of Ranchi in forwarding an explanation that was asked for by this Court has commented on the protracted litigation that has taken place in this matter. It is with much regret that we find ourselves obliged to order further proceedings. If we had power to cut matters short we would certainly do so; but we have not. It is with very great regret that we find that the law is as powerless as we are. We leave each side to pay their own costs.

In view of the judgment we have just delivered it is not necessary to go on with the Rule which is therefore discharged.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 197 OF 1911.

FLETCHER, J.
RICHARDSON, J.
1914,
Heard, 1, May.
Judgment, 7, May.

KUNJA BEHARY SEAL, Plaintiff, Appellant,
v.
DURGA PROSHAD SINGH and others, Defendants, Respondents.

Minerals, if passed under a Moghali brahmottar *grant, more than 100 years old and held at a uniform low rent*

Where it was proved that a mauza had been held for over 100 years under a Moghali brahmottar *grant, the origin of which could not be proved, at a uniform rent of Rs. 16 a year, and it did not appear that at the date of the grant any mines had been opened or that right to minerals had been acquired by the grantee or his successors-in-interest by prescription* :

Held—*That minerals (the existence of which was probably not thought of by anybody at the time the grant was made) did not pass by the grant, though the tenure created might be a permanent one.*

This was an appeal preferred on the 19th May 1911, against a decree of Babu Advaita Proshad Dey, Subordinate Judge of Zilla Manbhum, dated the 11th of March 1911.

The material facts will appear from the judgment.

Mr. B. Chuckerbutty, Babus Sib Chandra Palit and *Hiralal Sanyal* for the Appellant.

Babus Mohendra Nath Ray, Lalit Mohan Ghosh and *Tarakeshwar Pal Chowdhury* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—The only question arising for our decision in the present appeal is whether the minerals lying beneath the Mauza Jitpur in the Pargana of Jheria passed to the ancestor of the Tewari Defendants by a *Moghali brahmottar* grant at a rent of Rs. 16 a year by the ancestor of the Defendant No. 1. The Plaintiff has acquired a 15 as. 2¼ gandas share in the sub-soil of the mauza from the Tewaris and brought the suit for the declaration of his title to such share. His claim was resisted by the contesting Defendants on various grounds, the only one of which it is now material to consider is the defence that the *brahmottar* grant by the ancestor of the Defendant No. 1 to the ancestor of the Tewari Defendants did not pass the minerals to the grantee. The evidence before us is small and the case largely depends upon what are the proper inferences of fact to be drawn from certain admitted facts.

There is no document evidencing the grant of the *brahmottar*, although it would appear that it was granted more than 100 years ago. At that time it is not probable that any one thought of there being coal under these lands. In an attempt to prove the origin of the *brahmottar* grant the Plaintiff called the Defendant No. 17 to prove the origin of the grant. His statement was that he heard from his grandmother, that his ancestor had become degraded for some spiritual services rendered to the ancestor of the Defendant No. 1, and, therefore, the former Raja made a gift of the whole of his rights in the mauza. The learned Judge very properly refused to accept this statement as proving the origin of the grant.

The only facts proved are, *first*, that the grant was a *Moghali brahmottar* grant, and, *secondly*, that it has been held for more than 100 years at the same rent of Rs. 16. From these facts the learned Judge drew the inference, the *brahmottar* was a permanent tenure held at a rent of Rs. 16 a year. He however came to the conclusion that such a grant did not transfer the

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minerals to the grantee. It is not suggested in the present case that there were any mines opened on the property at the date of the grant, nor that the Plaintiff or the persons from whom he derives title have a prescriptive right to work any of the minerals under the property. The learned Judge therefore came to the conclusion that the Plaintiff had not shown that the former Raja parted with the minerals when he made the *brahmottar* grant to the Brahmin, Bekari Tewari.

I think, the learned Judge in this view was correct. The present case appears to me to be covered by authority.

The first case to which we have been referred is the case of *Hari Narain Singh* v. *Sriram Chuckerbutty* (1) which is a decision of the Judicial Committee of the Privy Council. The contest in that case was between the zamindar and certain Goswamis, the *shebaits* of an idol. Lord Collins in delivering the opinion of their Lordships made the following remarks :— "On the whole it seems to their Lordships that the title of the zamindar Raja to the village Petena as part of his zamindary before the arrival of the Goswamis on the scene being established, as it has been, he must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them, and no such evidence has been produced." I think, that decision covers the case now before us. There can be little, if any, distinction between the case of a *Moghali debutter* and a *Moghali brahmottar* grant. It has however been argued before us that, that decision does not apply to the present case, having regard to certain remarks made by Lord Collins in an earlier portion of the judgment. But a perusal of the judgment convinces me that in using the expression "occupancy right", their Lordships were not considering whether the idol was a tenure-holder, or a raiyat with an occupancy right or a raiyat with a non-occupancy right. It seems manifest to me that their Lordships were using this expression as opposed to the right of the zamindar who had the proprietary interest.

The next case that was cited to us was that of *Jyoti Proshad Singh* v. *Lachipur Coal Co.* (2). The facts in that case are undistinguishable from the present. The grant in that case was a *Moghali brahmottar* grant. The learned Judges held that such a grant even though permanent did not pass the mines unopened at the date of the grant. Next comes the case of *Durga Proshad Singh* v. *Braja Nath Bose* (3), which was also a decision of the Judicial Committee of the Privy Council. The contest in that case was between the persons claiming title from a Digwar and the zamindar, and it was held that the minerals were vested in the zamindar. Against these decisions the Appellant relies on the case of *Sonet Kooer* v. *Himmut Bahadur* (4). But the only point decided in that case was that on the failure of heirs of a person to whom a permanent tenure had been granted the escheat was to the Crown and not to the zamindar. But that case has nothing to do with the question of what was granted to the tenure-holder in the first instance. I think, therefore, that the learned Subordinate Judge came to a correct conclusion when he held that the *Moghali brahmottar* grant to the ancestor of the Tewari Defendants did not pass the minerals under the mauza.

(1) I. L. R. 37 Cal. 723 : s. c. 14 C. W. N. 746 (1910).

(2) I. L. R. 38 Cal. 845 : s. c. 16 C. W. N. 241 (1911).

(3) I. L. R. 39 Cal. 696 : s. c. 16 C. W. N. 482 (1912).

(4) I. L. R. 1 Cal. 391 (1876).

Accordingly the present appeal fails and must be dismissed with costs. We allow only one set of costs to be divided between the different sets of Respondents who have appeared. The Respondents are not entitled to the paper-book costs incurred by them.

RICHARDSON, J.—I agree that the case is covered by authority and that the appeal must be dismissed.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 415 OF 1913.

MOOKERJEE, J. BEACHCROFT, J 1914, 20. January

NIROD BARANI DEBI, Applicant, Appellant,

"

CHAMATKARINI DEBI, Opposite Party, Respondent.

Probate and Administration Act (V of 1881), sec. 34—Indian Succession Act (X of 1865), secs. 218, 239—Wrongful alienation of deceased's estate, apprehended by caveator—Temporary injunction, application for, if lies—Civil Procedure Code (Act V of 1908), Or 39, rr. 1, 7—Administrator pendente lite, *appointment of, proper course—Injunction when may be granted—English practice.*

A probate proceeding is not a suit in which there is property in dispute as contemplated by r. 1 of Or. 31 of the Civil Procedure Code, as the only question in controversy in such a proceeding is that of representation of the estate of the deceased and no question of title thereto, i.e., ***the title of the deceased or of the conflicting titles alleged by the parties to the proceeding can be investigated by the Court.***

But the Court of probate is not therefore incompetent to grant a temporary injunction in any circumstances.

The proper procedure to follow in cases of this description is for the aggrieved party to apply to the Court for the appointment of an administrator **pendente lite.** ***When such an application has been made, the Court may, in case of necessity, grant a temporary injunction either in exercise of its inherent power or under r. 7 of Or. 39 of the Civil Procedure Code.***

English practice referred to and contrasted.

This was an appeal from an order of S. C. Mallik, Esq., District Judge, Nadia, dated 1st August 1913.

The facts of the case material to this report will appear from the judgment.

Babu Narendra Kumar Bose for the Appellant.

Babu Baranosibasi Mukherjee for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal is directed against an order by which the Court below has refused to grant an injunction in a proceeding for letters of administration of the estate of one Brojo Nath Dobey. The Appellant Nirodbarani Debi and the Respondent Chamatkarini Debi are daughters of the deceased. Shortly after the death of Brojo Nath Dobey, Nirodbarani applied for letters of administration to his estate. Thereafter, Chamatkarini made an application for probate of a Will alleged to have been executed in her favour by her father.

There were thus two counter-cases before the Court and the question of the genuineness and validity of the Will had to be determined in the first instance. Before the cases came on for trial, the Appellant Nirodbarani who had asked for letters of administration applied to the Court for an injunction to restrain her sister from alienating the properties of which she was in possession. The Court refused the injunction on the ground that r. 1 of Or. 39 of the Code of Civil Procedure had no application to a proceeding for letters of administration under the Probate and Ad-

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ministration Act of 1881. The substantial question for consideration in the appeal, consequently, is whether the injunction has been rightly refused.

On behalf of the Appellant, it has been contended that under sec. 83 of the Probate and Administration Act, the provisions of the Code of Civil Procedure are applicable to contentious cases, because that section provides that the proceeding shall take as nearly as possible the form of a suit according to the provisions of the Code of Civil Procedure in which the Petitioner for probate or letters of administration, as the case may be, shall be the Plaintiff, and the person who may have appeared to oppose the grant shall be the Defendant. Reference has also been made to sec. 55 of the Probate and Administration Act which provides that the proceedings of the Court of the District Judge in relation to the grant of probate and letters of administration shall, except as otherwise provided, be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure. In support of the contention that the provisions of the Civil Procedure Code are applicable to probate proceedings, reliance has also been placed on the cases of *Yeshwant Bhagwant* v. *Shanker Ram Chunder* (1) and *In the matter of Dawabi* (2) in which a Receiver was appointed in proceedings for the grant of letters of administration, *Watkins* v. *Brent* (3) and *Rendall* v. *Rendall* (4) in which Receivers were appointed during the pendency of probate proceedings, and *Nicholas* v. *Dracachis* (5) and *In the goods of Moore* (6) where injunctions were granted during the pendency of a probate proceeding. Our attention has not been invited to any case in the Indian Courts in which an injunction has been granted under circumstances similar to those of the case before us.

The decision of the question raised must depend primarily upon the terms of Or. 39, r. 1, of the Code of Civil Procedure, assuming that the provisions of that Rule are applicable to proceedings under the Probate and Administration Act by virtue of sec. 55 thereof. It is essential for the application of r. 1 of Or. 39, that the property in dispute in the suit is in danger of being wasted, damaged or alienated by a party or wrongfully sold in execution of a decree. Consequently the Applicant for an injunction must satisfy the Court that the proceeding is a suit in which there is property in dispute and that the property is in danger of being wasted, damaged or alienated. The question, consequently, arises, whether a proceeding for probate of a Will or for letters of administration may rightly be held to be a suit in which property is in dispute. In our opinion, the answer must be in the negative. It has been repeatedly held, as appears from the cases of *Arunmoyi Dasi* v. *Mohendra Nath Wadar* (7), *Jagannath* v. *Runjit Singh* (8), *Birj Nath* v. *Chander Mohan Banerjee* (9) and *Ochavaram Nanabhai* v. *Dolatram* (10), that the only question in controversy in a proceeding in the Probate Court is that of representation of the estate of the deceased, and no question of title thereto, that is, the title of the deceased or of the conflicting titles alleged by the parties to the probate proceeding can be investigated by the Court. Consequently it would be, in our opinion, an undue straining of the

(1) I. L. R. 17 Bom. 388 (1892).
(2) I. L. R. 18 Bom. 237 (1893).
(3) 1 Myl. & Cr. 102 (1835)
(4) 1 Hare 152 (1841).
(5) L. R. 1 Pro Div. 72 (1875).
(6) L. R. 13 Pro. Div. 36 (1888).
(7) I. L. R. 20 Cal. 888 (1893).
(8) I. L. R. 25 Cal. 354 (1897).
(9) I. L. R. 19 All. 458 (1897).
(10) I. L. R. 28 Bom. 644 (1904).

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language to hold that a probate proceeding is a suit in which there is property in dispute. The circumstance that in England an injunction has been granted in a probate proceeding is of no assistance to the Appellant, because the terms of sec. 25, sub-sec. 8, of the Judicature Act of 1873 are wider than the language used by the legislature in this country in r. 1 of Or. 39. We are clearly of opinion that the application made to the Court below by the present Appellant was misconceived.

But we do not lay down the proposition that the Court is not competent, because it is a Court of Probate, to grant an injunction in any circumstances. In England, injunctions have been granted in cases of this description under r. 3 of Or. 50, of the Rules of the Supreme Court. There is a corresponding provision in the Code of Civil Procedure embodied in r. 7 of Or. 39. The proper procedure to follow in cases of this description is for the aggrieved party to apply to the Court for the appointment of an administrator *pendente lite*, under sec. 34 of the Probate and Administration Act. It is not necessary for our present purpose to examine the scope of sec. 218 of the Indian Succession Act (which is reproduced in the Probate and Administration Act as sec. 34) and of sec. 239 of the Indian Succession Act (to which there is nothing corresponding in the Probate and Administration Act). It is possible that the scopes of the two sections are different in this way; namely, the former section contemplates an application by a party to the proceeding after the commencement thereof and gives the person appointed as administrator *pendente lite* power to deal with the estate, subject to the restrictions mentioned, whereas sec. 239 contemplates the possibility of an application by a stranger to the proceeding, an application before the commencement of the proceeding, and deals only with the question of the custody and preservation of the property. As we have said, the proper course to pursue in a case of this description is to make an application under sec. 34 of the Probate and Administration Act, and, in this view, it is unnecessary to consider whether the provisions of the Code relating to the appointment of a Receiver are applicable to cases of this description. In England, Receivers are appointed in the course of probate proceedings in respect of immoveable properties, while administrators *pendente lite* are appointed in respect of moveable properties of the deceased. In this country, the Legislature has made a single provision by which an administrator *pendente lite* appointed under sec. 34 takes charge of the entire estate of the deceased. When an application has been made under sec. 34, it may be necessary for the Court to grant an injunction either in the exercise of its inherent power or under r. 7 of Or. 39 of the Code. For instance, it may be brought to the notice of the Court that a party in possession is about to deal with the moveable properties: unless an injunction is granted, the appointment even of an administrator *pendente lite* may become fruitless. The Court, under such circumstances, has ample authority, either under statutory powers or in the exercise of its inherent jurisdiction, to make a temporary order, so as not to defeat the ultimate order which the Court is competent to make.

In the case before us, the Appellant did not make an application under sec. 34 of the Probate and Administration Act, though that was her obvious remedy. The only question for consideration now is, whether we should affirm the order of the District Judge and leave it open to him to deal with an application under sec. 34, or

we should in this proceeding make an order in that behalf. In our opinion, the latter course should be adopted, as the Respondent has expressed an intention to deal with the moveable properties in her hands for the payment of debts. There may also be debts to be realised. In any event, on the facts stated in the affidavit it is manifest that the estate stands in need of immediate administration.

The result is that we allow this appeal, set aside the order of the District Judge and direct him to appoint forthwith an administrator *pendente lite* under sec. 34 of the Probate and Administration Act. There will be no order for costs either in this Court or in the Court below.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1185 OF 1911.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 19, 20 & 23, March.
Judgment, 6, July.

MOHAMAYA DEBI, Plaintiff, Appellant,
v.
HARIDAS HALDAR and anr., Defendants, Respondents.

Hindu law—Turn of worship, custom of alienation if unreasonable—Kalighat temple, **palas** ***of—Custom of alienation to person who may succeed by birth or marriage, if reasonable—Essentials of valid custom—Proof that custom immemorial—Presumption—Mortgage of*** **pala**—***Mortgagee if may question validity of mortgage—Estoppel—Foreclosure of property not immoveable, if lawful.***

Evidence showing exercise of a right in accordance with an alleged custom, as far back as living testimony can go, raises the presumption, though only a rebuttable one, as to the immemorial existence of the custom.

A custom was proved that the palas *or turns of worship of a certain temple were transferred by sale, mortgage, lease or gift and also that they were the subjects of partition and testamentary devise, but that the transfers had not been unrestricted, being confined to co-*shebaits *or to the members of families to whom a* shebait *could bestow his daughters in marriage:*

Held—*That the custom was not unreasonable.*

Such a custom is not unreasonable merely because it contravenes the rule of Hindu law that a religious office is inalienable.

Since customs in general involve some inconsistency with the general common law of the realm or are contrary to a particular maxim, the fact of this inconsistency is not of itself a ground for holding the custom unreasonable and bad.

The reason referred to in the rule that a custom should be reasonable is not every unlearned man's reason, but artificial and legal reason warranted by authority of law. It is sufficient if no good legal reason can be assigned against it.

The period for ascertaining whether a particular custom is reasonable or not, is the time of its possible inception.

Since every custom sanctioned by the Courts must be reasonable, it follows that every case where a custom has been upheld by the Courts is an example of a reasonable custom.

In the absence of a custom or usage to the contrary or any term to that effect in the deed of endowment, a religious trust or the right of management of a religious or charitable endowment or a religious office attached to a temple or any other endowment cannot be alienated by the holder.

There is authority for the proposition that alienation of a religious office may be validly made in favour of a person stand-

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ing in the line of succession and not disqualified by personal unfitness.

Foreclosure is a remedy of the mortgagee which is not confined to mortgages of land. It is equally applicable to mortgages of chattels.

The mortgagee of a pala *of worship is a mortgagee not of immoveable but of intangible property and he is entitled to foreclose the mortgage quite as much as a mortgagee of chattels.*

Where in mortgaging his turn of worship the shebait *expressly declared that no objection on his part or on behalf of his heirs or representatives would be maintainable :*

Held, *by* MOOKERJEE, J. (BEACHCROFT, J., *reserving his opinion) that in the circumstances of the case the Court should not depart from the ordinary rule that the mortgagor cannot dispute the title of the mortgagee.*

The rule that the mortgagor cannot set up against his mortgagee the title of a third person has been held applicable where the mortgagee is a trustee, acting in a public capacity and not for his own benefit —though it would be inapplicable where the mortgage is void as contrary to statute.

This was an appeal from a decision of T. W. Richardson Esq., District Judge, 24-Parganas, dated 3rd February 1911, modifying that of Babu Pramathanath Chatterjee, Subordinate Judge, 24-Parganas, dated 16th August 1910.

The material facts are set out in the judgment.

Dr. Rash Behary Ghosh, Babus Mohendra Nath Roy, Biraj Mohan Mozumdar, Hari Bhusan Mookerjee, Mohini Mohan Chatterjee and *Sarat Chandra Mukherjee* for the Appellant.

Mr. C. R. Dass and *Babu Atul Krishna Roy* **for the Respondents.**

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the Plaintiff in a suit for foreclosure of a mortgage by way of conditional sale, executed in her favour by the Defendants on the 16th August 1905, in renewal of two previous conditional mortgages, dated the 8th October 1900 and 9th December 1901. The earlier mortgages had been granted to secure loans of Rs. 1,400 and Rs. 800 respectively. The mortgage now in suit was given to secure the sum of Rs. 2,200 which was to carry interest at the moderate rate of six per cent. per annum and was made repayable on the 16th August 1908. The subject-matter of the security consisted of three *palas* or turns of worship held by the mortgagors in the temple of the Goddess Kali at Kalighat. The mortgage money was not repaid on the due date, and the Plaintiff commenced this action on the 13th September 1909 to recover the sum with interest and costs. The Plaintiff alleged in the plaint that the *palas* were transferable according to immemorial custom. The first Defendant, who alone contested the claim, set up in his written statement the case that the *palas* were not transferable by custom, and that even if the alleged custom was proved, no Court should recognise and enforce it, as it was unreasonable and opposed to public policy. The Subordinate Judge held that the *palas* were transferable by custom in a limited market, that the custom was neither unreasonable nor opposed to public policy, and, that the Plaintiff was accordingly entitled to a foreclosure decree. On appeal, the District Judge has reversed this decision and has given the Plaintiff only a personal decree against the Defendants, as in his opinion the custom of transferability of *palas* was

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opposed to public policy and unenforceable in a Court of Justice. On the present appeal by the Plaintiff, three substantial grounds emerge for consideration, namely, *first*, are the mortgagors estopped to deny the validity of the mortgage on the ground that the property given by way of security was inalienable: *secondly*, is the custom of transferability of *palas* reasonable so that it may be recognised and enforced by a Court of Justice; and, *thirdly*, is the Plaintiff entitled to a foreclosure decree, in view of the nature of the property given by way of security? Before I deal with these questions, it is necessary to define the custom, which, the Courts below have concurrently found, does exist in respect of this particular religious foundation.

The Courts below have found that *palas* are ordinarily transferred by sale, mortgage, lease and gift, and that they are also the subject of partition and of testamentary devise. This is proved, not merely by oral evidence, but also by evidence of concrete instances in which such transactions have come before Courts and have been upheld as legal. One of the earliest transactions of which we find mention is a mortgage by way of conditional sale of a *pala*, which was executed on the 4th October 1819 and was foreclosed in due course. We have other instances of conditional mortgages, dated 11th April 1831 and 29th June 1831, which were both foreclosed in 1837. We have further a conditional mortgage of the 18th February 1835 which was foreclosed on the 8th August 1840 after contest in a suit in which the mortgagor unsuccessfully pleaded that the *pala* was non-transferable. A more modern instance is a conditional sale of 1864 which was foreclosed on the 16th December 1867. Instances of sales of *palas*, specially in recent years, are quite numerous, and it is not disputed that two of the *palas* in suit were acquired by the father of the first Defendant, mortgagor, by purchase. Instances have also been adduced in which *palas* have been sold in execution of decrees, have been leased out for longer or shorter periods, have been bequeathed like other property and have in fact formed the subject of transfer in some form or other. One of the most recent instances on the record is a decree of this Court, dated 30th August 1900, which directed possession to be delivered of a *pala* which had been mortgaged by way of conditional sale, followed by a decree for foreclosure. It has been conclusively proved that 83 *palas* out of 360 have changed hands permanently. These facts amply justify the concurrent finding of the Courts below that the custom of transfer of *palas* of the Kalighat shrine has been established beyond the shadow of a doubt; the existence of the custom has been traced back almost to the time of the first establishment of British Courts in this country, and even as early as 1840, the Court found that the custom of transfer was fully established. The evidence, at the same time, established that these transfers have not been unrestricted; but have been confined to co-*shebaits* or to the members of families to whom a *shebait* can bestow his daughters in marriage; in other words, there is undisputed and overwhelming evidence, oral and documentary, that in practice *palas* have been transferred during at least 90 years, though in a limited market which those alone can enter who are qualified to become *shebait* by birth or marriage. Only one instance has been traced, in which a transfer in favour of an absolute stranger, not connected with the hereditary *shebaits* by blood or marriage, has been recognised, but the transferee in that case was the hereditary *pujari* or priest whose function, it must

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be observed, is entirely distinct from that of a *shebait*. The Plaintiff is the widow of one Jnanendra Nath Mookherjee who was the son of the daughter's son of a member of the senior branch of the family of Haldars who are the hereditary *shebaits* of the Goddess Kali. The husband of the Plaintiff was also the son of a daughter of a Haldar, in other words, the husband of the Plaintiff was descended from the Haldars on the paternal as also on the maternal side. The Plaintiff is, consequently, a possible *shebait*; in other words, the contingency might have happened which would have entitled the Plaintiff to take one or more *palas* by inheritance. The Plaintiff is plainly entitled to the benefit of the custom, and this conclusion does not in any way contravene the well-established rule that a custom cannot be enlarged by parity of reasoning [*Arthur* v. *Bakenham* (1), *Pradyote Kumar* v. *Gopi Krishna* (2)]. The Plaintiff is conclusively proved to belong to a class of persons to whom *palas* have hitherto been transferred and the transfers have been recognised as valid. Consequently, if the validity of the custom is established, there is no conceivable reason why the Plaintiff should not by foreclosure become entitled to the three *palas* in dispute.

As regards the first question, it has been argued on behalf of the mortgagee that as no man is allowed to dispute a title which he himself has granted, the mortgagor cannot set up against his mortgagee the title of a third person; this cannot be disputed [*Doe* v. *Pegge* (3), *Goodtitle* v. *Bailey* (4), *Doe* v. *Vickers* (5), *Doe v. Clifton* (6), *King* v. *Smith* (7), *Debendra Nath* v. *Mirza Abdul Samed* (8)]. The rule has been held applicable where the mortgagor is a trustee, acting in a public capacity and not for his own benefit [*Doe* v. *Horne* (9), notwithstanding the contrary dictum in *Fairtitle* v. *Gilbert* (10), *Doe* v. *Hares* (11)], and the principle has been repeatedly approved and applied in the Courts of the United States that a mortgagor is estopped to deny his title, and cannot set up as a defence for himself against the mortgagee that the property so mortgaged is trust property which he has no right to mortgage [*Bush* v. *Marshall* (12), *Strong* v. *Waddell* (13), *Jones* v. *Reese* (14), *Farris* v. *Horston* (15), *Boisclair* v. *Jones* (16), *Usina* v. *Wilder* (17), *McLeon* v. *Smith* (18)]. The reason for the rule is concisely put by Collier, C. J., in *Stewart* v. *Anderson* (19), "by the mortgage, the mortgagor professes to convey, and thus declares that he has an interest co-extensive with what he undertakes to transfer; and he will not be heard to say, in contradiction of his own deed or in opposition to a claim founded thereon, that he was guilty of a falsehood and had no estate or interest therein." This principle has been held inapplicable where the mortgage is void as contrary to statute [*Brewstar* v. *Madden* (20)] on the ground that "it is not competent to parties to a con-

(1) 11 Modern 148 (161) (170).
(2) I. L. R. 37 Cal. 323 (326) (1910).
(3) 1 T. R 758 (1785).
(4) Cowper 601 (1777).
(5) 4 A. & E. 782 (1836).
(6) 4 A. & E. 813 (1836).

(7) [1900] 2 Ch. 425.
(8) 10 C. L. J. 150 (63) (1909).
(9) 3 Q. B. 757; 61 R. R. 397 (1842).
(10) 2 T. R 171.
(11) 4 B. & Ad. 435 (440) (1833).
(12) 6 Howard 284.
(13) 56 Ala. 471.
(14) 65 Ala. 134.
(15) 74 Ala. 162.
(16) 40 Ga. 499.
(17) 58 Ga. 178.
(18) 49 Wis. 200.
(19) 10 Ala. 504 (508).
(20) 15 Kans 249.

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tract to estop themselves or any body else in the face of an Act of Parliament": *Barrow's* case (21). Hence, it has been ruled that a corporation is not estopped from pleading that a mortgage made by it is *ultra vires*: *Ex parte Watson* (22). See also *Fairtitle* v. *Gilbert* (10), *Blackburn* v. *Cunliffe* (23), *British M. B. Co.* v. *Charnwood F. R. Co.* (24). But the view has been steadily maintained that trustees for a public purpose are not, by the nature of their office, protected from the operation of estoppel as against the assignees of the original parties to the deed in question [*Doe* v. *Horne* (9), *Webb* v. *Herne* (25), *Higgs* v. *Northern Assam Tea Co.* (26)]. I am not prepared to accept the view indicated by Banerjee, J., in *Mallika* v. *Ratanmoni* (27), which receives no support from the decision of the Judicial Committee in *Juggut Mohinee* v. *Sookhemony* (28), cited in support of this position; but there are cases where trustees have been allowed to impeach their own grants [*Rumonee* v. *Baluck* (29) and conflicting dicta are to be found in *Gulam Drabi* v. *Nagammal* (30) and *Gulzar* v. *Fida* (31); see *Sidhu Sahu* v. *Gopi Charan* (32) where the earlier cases are discussed]. I am of opinion that in the case before us, the Court should not depart from the ordinary rule that the mortgagor cannot dispute the title of the mortgagee, specially in view of the express declaration of the mortgagors in the fourth paragraph of the mortgage-deed that "no objection on their part or on behalf of their heirs or representatives shall be maintainable." But I do not desire to rest the decision solely on the ground of estoppel, for, as will presently be seen, there is no substance in the objection raised by the mortgagors.

As regards the second question, it has not been disputed on behalf of the mortgagee that in the absence of a custom or usage to the contrary or any term to that effect in the deed of endowment, a religious trust or the right of management of a religious or charitable endowment or a religious office attached to a temple or any other endowment cannot be alienated by the holder: *Raja Vurmah* v. *Ravi Vurmah* (33), *Rama Varma* v. *Raman Nayar* (34), *Kannan* v. *Nilakandan* (35) *Lakshmanswami* v. *Rangamma* (36), *Gnanasambandha* v. *Velu Pandaram* (37), *Abdul Wahib* v. *Rahman* (38), *Narayana* v. *Ranga* (39), *Subbarayudu* v. *Kotayya* (40), *Alagappa* v. *Sivarama Sundara* (41), *Rajeswar* v. *Gopeswar* (42), *Durga* v. *Chanchal* (43), *Rup Narayan* v *Junko* (44), *Mallika* v. *Ratanmoni* (27), *Rangaswami* v. *Ranga* (45), *Rajaram* v.

(9) 13 Q. B. 757; 61 R. R. 397 (1842).
(10) 2 T. R. 169 (1787)
(21) 14 Ch. D. 482 (441) (1880).
(22) 21 Q. B. D 301 (302) (1888).
(23) 29 Ch. D. 902 (1885).
(24) 18 Q. B. D 714 (719) (1887).
(25) L. R. 5 Q. B. 642 (1870).
(26) L. R. 4 Ex. 387 (1869).
(27) 1 C. W. N. 493 (1897).
(28) 14 M. I. A. 289; 10 B. L. R. 10; 17 W. R. 41 (1871).
(29) 14 W. R. 101 (1870).
(30) 6 Mad. L. J. 270.
(31) I. L. R. 6 All. 24 (1888).
(32) 17 C. L. J. 233 (237) (1912).

(27) 1 C. W. N. 493 1897).
(33) L. R. 4 I. A. 76: s. c. I. L. R. 1 Mad. 235 (1876).
(34) I. L. R. 5 Mad 189 (1832).
(35) I. L. R. 7 Mad. 337 (1884).
(36) I. L. R. 26 Mad. 31 (1902)
(37) L. R. 27 I. A. 69; s. c. I. L. R. 23 Mad. 271 (1899).
(38) I. L. R. 24 Cal. 83 (1896).
(39) I. L. R. 15 Mad. 183 (1891).
(40) I. L. R. 15 Mad. 389 (1892).
(41) I. L. R. 19 Mad. 211 (1896).
(42) 11 C. W. N. 782: s. c. I. L. R. 34 Cal. 828 (1907); on app. 12 C. W. N. 328: s c. I. L. R. 35 Cal. 226 (1907).
(43) I. L. R. 4 All. 81 (1881).
(44) 3 C. L. R. 112 (1878).
(45) I. L. R 16 Mad. 146 (1892).

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Ganesh (46), *Ukoar* v. *Chander* (47), *Juggurnath* v. *Kishen* (48), *Kali Charan* v *Bangshi* (49), *Dube* v. *Srinibas* (50), *Ramanathan* v. *Murugappa* (51), *Trimbak* v. *Lakshman* (52) and *Kuppa* v. *Dorasami* (53). There is also authority for the proposition, that alienation of a religious office may be validly made in favour of a person standing in the line of succession and not disqualified by personal unfitness: *Sitaram Bhat* v. *Sitaram Ganesh* (54), *Mancharam* v. *Pranshankar* (55), *Annasami* v. *Rama Krishna* (56) and *Nirad Mohini* v. *Shibadas* (57). But the Appellant does not invite us to go even as far as this proposition. She asks us to assume that a *pala* or turn of worship is not alienable, except by custom, and contends that the custom which has been proved in this case should be recognised by the Court: *Raja Vurmah* v *Ravi Vurmah* (33), *Gnanasambandha* v. *Velu Pandaram* (37). This raises the question, whether the custom possesses the characteristics deemed essential for the validity of a custom. These essential attributes were specified by Tindal, C. J., in *Tyson* v. *Smith* (58) in these terms: "A custom to be valid must have four essential attributes—*first*, it must be immemorial; *secondly*, it must be reasonable; *thirdly*, it must have continued without interruption since its immemorial origin; and *fourthly*, it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect". [See also *Hurpurshad* v. *Sheo* (59), *Raja Vurmah* v. *Ravi Vurmah* (33), *Lutchmeeput Singh* v. *Sadaulla* (60) and *Ghasiti* v. *Umrao* (61).] In the case before us, the custom obviously satisfies the first, third and fourth requirements. The time when the custom originated is unknown; all that has been ascertained is that, as far as the evidence can be carried back, it has been in existence. This takes the case out of the rule formulated by Willes, J., in *London Corporation* v. *Cox* (62) that "a custom originating within time of memory, even though existing in fact, is void at law." There is no force in the contention that the proof of the existence of the custom should have been carried back by direct evidence to 1793 when the first Regulations were passed by the Indian Legislature, if not to the year 1773, when the Supreme Court was established. It is well settled that evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go, raises the presumption, though only a rebuttable presumption, as to the immemorial existence of the custom. As Tindal, C. J., said in *Bastard* v. *Smith* (63), you cannot reasonably expect to have it proved that the custom did in fact exist before time of legal memory; but you are to require proof, as far back as living memory goes, of a continuous, peaceable and uninterrupted user

(33) L. R. 4 I. A 76: s. c. I. L. R. 1 Mad. 235 (1876).
(37) L. R. 27 I. A. 69: s. c. I. L. R. 23 Mad. 271 (1899).
(46) I. L. R. 23 Bom. 131 (1898)
(47) 3 W. R. 152.
(48) 7 T. R. 266 (1867).
(49) 15 W. R. 399; 6 B. L. R. 727 (1871).
(50) 5 B L. R. 617 (1870).
(51) I. L R. 27 Mad. 192 (1903).
(52) I. L. R. 20 Bom. 495 (1895).
(53) I. L. R. 6 Mad. 26 (1886).
(54) 6 Bom. H. C. R. 250 (1869).
(55) I. L. R. 6 Bom. 298 (1882).
(56) I. L. R. 24 Mad. 219 (1900)
(57) I. L. R. 36 Cal 975 (1909).
(58) 9 Ad. and El. 406 (1838)

(33) L. R. 4 I. A. 76: s. c. I. L. R. 1 Mad. 235 (1876).
(59) L. R. 3 I. A. 259.
(60) I. L. R. 9 Cal 698 (1882).
(61) I. L. R. 21 Cal. 149 (1893).
(62) L. R. 2 H. L. 239 (259) (1866).
(63) 2 Moody and Ryan 129 (136).

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of the custom. To the same effect is the observation of Farwell, J., in *Mercer* v. *Denne* (64): "not only ought the Court to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present, unless such inference is irresistible, but it ought to presume everything possible to presume in favour of such a right." It is interesting to note that Vijnaneswara in his *Mitakshara* enunciated a similar rule (Yajnavalkya, Book II, 27). On the authority of a text of Katyayana, he holds that "time within the memory of man extends as far as a hundred years," as a man has, according to *Sruti*, a hundred years' duration of life. (Mitakshara, trans., Gharpure, p. 50.) Apararka, in his commentary on the same text of Yajnavalkya, treats a period beyond three generations (that is, one hundred and five years) as time immemorial, and, refers to an earlier text to show that a period beyond sixty years might be treated as time beyond human memory. In any event, it is well settled that if the existence of the custom has been proved for a long period, the onus lies on the person seeking to disprove the custom, to demonstrate its impossibility; in this case, the mortgagors have entirely failed to meet the evidence of the custom adduced by the Plaintiff. There is also no reason for serious controversy as regards the certainty and continuity of the custom. The only question, consequently, for consideration is, whether it is reasonable as the Appellant contends, or unreasonable and opposed to public policy as the Respondent asserts. It is indisputable that if a custom be against reason, it has no force in law; but as explained in Co. Litt 62A, the reason here referred to is not to be understood as meaning every unlearned man's reason, but artificial and legal reason warranted by authority of law; or as Blackstone puts it (Commentaries, Vol. 1, p. 77), it is sufficient if no good legal reason can be assigned against it. When, however it is said that a custom is void, because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times: *Salisbury* v. *Gladstone* (65). It is also well settled that the period for ascertaining whether a particular custom is reasonable or not, is the time of its possible inception; this is in accord with the observation in the *Tanistry case* (66): "the commencement of a custom (for every custom hath a commencement, although the memory of man doth not extend to it, as the river Nile hath a spring although Geographers cannot find it) ought to be upon reasonable ground and cause, for if it was unreasonable in the original, no usage or continuance can make it good: *Quod ab initio non valuit tractu temporis non convalescet.*" When tested in the light of these principles, no good ground can be assigned why the custom should be condemned as unreasonable. There is no force in the contention of the Respondents that because the custom contravenes the rule that a religious office is inalienable, it must be pronounced to be against public policy; if this argument were to prevail, all customs would be unreasonable. Since customs in general involve some inconsistency with the general common law of the realm or are contrary to a particular maxim, the fact of this inconsistency is not of itself a ground for holding the

(64) [1904] 2 Ch. 534 (556).

(65) 9 H. L. C. 692 (1861).

(66) Davis 29 (32).

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custom unreasonable and bad [*Tyson* v. *Smith* (58)]. Thus in the *Tanistry case* (66), it is said that "several customs which had been adjudged void in our books as being unreasonable against common right or purely against law, if their nature and quality be considered, will be found injurious to the multitude and prejudicial to the common wealth." To the same effect is Co. Litt 113A; "*Consuetudo ex certa causa rationabili usitata privat communem legem.*" Is there then anything to show that this custom is injurious to the endowment or to the common wealth? One of the mortgagors has a turn of worship or *pala;* he is entitled in this character to collect the offerings made to the Goddess on the day on which his turn falls; he applies a portion of the income for the worship of the Goddess and appropriates the remainder for his personal use. It is not material to consider whether he should not apply the whole of the income for religious and charitable purposes; but let us assume that he, and every *shebait* like him who has a *pala*, may be compelled to do so. He transfers his turn of worship to a person who, in certain contingencies, might, in his own right, have been a *shebait* and might have held a *pala*. The transferee, as holder of the *pala*, is under precisely the same obligation to the endowment as the transferor himself. It is difficult to appreciate how a custom which recognises and validates a transfer to members of a limited circle under these circumstances can be detrimental to the endowment or to the public. There is no question that a *pala* of the Kalighat temple is heritable, and it is immaterial whether the heir is a male or female; the custom in this respect is established beyond doubt [*Janokee* v. *Gopaul* (67)]. There is also no question that though probably religious offices were originally indivisible, they are now deemed partible [*Trimbak* v. *Lakshman* (52), *Mitta Kunth* v. *Neerunjun* (68), *Elder widow* v. *Younger widow* (69), *Sethu Rama* v. *Meruswamiar* (70), *Damodar Das* v. *Uttam Ram* (71), *Nagia* v. *Muthachary* (72), *Limba* v. *Rama* (73), *Raman* v. *Gopal* (74), *Rajeswar* v. *Gopeswar* (42), *Anundmoyee* v. *Rajkant Nath* (75), *Ram Soondur* v. *Tarak* (76), *Debendra* v. *Odit* (77), *Ishan* v. *Monmohini* (78) and *Gopee* v. *Thakoordass* (79)]. Indeed, the very name *pala* or turn of worship shows that the right is partible. This involves, by necessary implication, the attribute of transferability as amongst the members of the family of *shebaits;* partition signifies the surrender of a portion of joint right in exchange for a similar right from the co-owner. There is further no question that a *pala* has not only been deemed heritable and partible; it has also been treated as devisable, as is illustrated by the case of the sister of the first Defendant, who obtained a *pala* under the testamentary devise of her father. This, again, involves the recognition of the transferable character of a *pala;* the exer-

(58) 9 Ad. and El. 406 (422) (1838).
(66) Davis 29 (32).

(42) 11 C. W. N. 782: s. c. I. L. R. 34 Cal. 828 (1907); on app 12 C. W. N. 323: s. c. I. L. R. 35 Cal 226 (1907).
(52) I. L. R. 20 Bom. 495 (1895).
(67) I. L. R. 2 Cal. 365 (372) (1877)
(68) 14 B. L. R. 166; 22 W. R. 437 (1874).
(69) 1 Mac Sel Rep 180 (23?).
(70) I. L. R. 34 Mad. 470 (1909).
(71) I. L. R. 17 Bom 271 (1892).
(72) 11 M. L. J. 215 (222) (1901).
(73) I. L. R. 13 Bom 548 (1888).
(74) I. L. R. 19 All. 428 (1897).
(75) 8 W. R. 193 (1867).
(76) 19 W. R. 28 (1872).
(77) I. L. R. 3 Cal. 390 (1878).
(78) I. L. R. 4 Cal. 688 (1878).
(79) I. L. R. 8 Cal. 807 (1882).

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cise of the right to make a bequest implies an assertion of the right to make a transfer *inter vivos*. It follows, consequently, that the customary right to make a sale, mortgage, gift or lease of a *pala* in favour of persons within a limited circle is closely associated with and possibly developed out of the heritable, devisable, and partible character of a *pala*. A custom of this description clearly cannot be characterised on any rational ground as unreasonable or opposed to public policy. It is further worthy of note that this is not a novel view of the true character of such a custom; for as early as 8th August 1840, the validity of a conditional mortgage of a *pala*, effected on the 18th February 1835, was upheld in a contested litigation. Since every custom sanctioned by the Courts must be reasonable, it follows that every case where a custom has been upheld by the Courts is an example of a reasonable custom. When the evidence is examined from this point of view the case for the mortgagee is materially strengthened; for, as is clear from the record, not only the existence but also the validity of the custom has been repeatedly recognised by the Courts during at least 70 years prior to the institution of this suit, while no single instance has been found where its reasonableness has been successfully assailed. The custom of transferability of a *pala* in favour of a limited circle of transferees must accordingly be held valid and no good reason has been assigned why it should be deemed unreasonable or opposed to public policy.

As regards the third question, it has been argued on behalf of the mortgagor Respondents that as Or. 34 of the Civil Procedure Code of 1908 applies only to mortgages of immoveable property, the Plaintiff is not entitled to a decree for foreclosure; and in this connection, reference has been made to *Eshan Chandra* v. *Monmohini* (78) and *Jati Kar* v. *Mukunda Deb* (80), to show that a *pala* or turn of worship is not immoveable property. There is no substance in this contention. It is well settled that foreclosure is a remedy of the mortgagee which is not confined to mortgages of land; it is equally applicable to mortgages of chattels, as decided by the House of Lords in *Harrison* v. *Hart* (81), *Tancred* v. *Potts* (82), and *Kemp* v. *Westbrook* (83). The case before us is clearly not that of a pledge of a moveable; such a pledgee, as pointed out in *Harrold* v. *Plenty* (84), is in a very different position from an ordinary mortgagee, as he has only a special property in the thing pledged and may obtain a sale but not a foreclosure. The Plaintiff is a mortgagee, not of immoveable but of intangible property, and he is entitled to foreclose the mortgage quite as much as a mortgagee of chattels. [Jones on Chattel Mortgage, 1908, secs. 699 and 776.] It is worthy of note that as early as 1181, Glanville described in detail a remedy applicable to chattel mortgages which is substantially equivalent to the modern procedure for foreclosure and order absolute on failure of the mortgagor to redeem within the period fixed by the Court. [Glanville, Tr. Beames, Book X, Ch. 6-8; Ed. Beale, 1900, pp. 204-210.] It may be added that if the contention of the mortgagors were to prevail they might find themselves in a worse position than what they would occupy under a foreclosure decree; for, if the procedure for foreclosure, with its consequent opportunity to the mortgagor to redeem, is not applicable, the mortgagee may very well

(78) I. L. R. 4 Cal. 683 (1878).
(80) I. L. R. 39 Cal. 227 (1911).
(81) 1 Comyns 393; 2 Eq. Cas. Abr. 6.
(82) 2 Fonblanque on Equity, Fifth Edn. 261n.
(83) 1 Ves. (sen.) 278 (1749).
(84) [1901] 2 Ch. 314.

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contend that the contract between the parties must be strictly enforced and that as the time for repayment has passed away, the title of the mortgagee to the mortgaged property has become absolute; such a result could hardly have been contemplated by the mortgagors.

The result is that this appeal is allowed and the decree of the District Judge discharged. On account taken of the sum due on the conditional mortgage in suit on the 16th November next, it transpires that the mortgagee will be entitled to Rs. 3,421 for principal and interest up to that date. The decree will direct that if the Defendants pay this sum, together with costs of all the Courts with interest thereon (as specified in the decree of this Court) on or before the 16th November 1914, the mortgage will stand redeemed. On default the mortgage will be foreclosed after the decree absolute has been made by the primary Court in due course. The hearing fee in this Court is assessed at thirty gold mohurs.

BEACHCROFT, J.—I agree with the proposed order on the second ground discussed by my learned brother. On the question of estoppel I prefer to reserve my opinion.

Appeal allowed.

[CRIMINAL APPELLATE JURISDICTION.]

APP. NO. 903 OF 1911.

HOLMWOOD, J.
SHARFUDDIN, J.
1912,
Heard, 13 and 14, February.
Judgment, 19, February.

JUNG RAI and others, Appellants,
v.
THE KING-EMPEROR, Respondent.

Criminal Procedure Code (Act V of 1898), sec. 161—Statement recorded by the police, consideration of, by Court—Criminal trial—Duty of Judge to record independent finding as to truth or otherwise of evidence.

Where the Sessions Judge in his judgment gave no finding as to the truth or falsity of each witness's statement, but relied entirely on the difference in what they said in Court and what they said or were alleged not to have said before the police:

Held—*That it is exceedingly dangerous to appeal from evidence judicially recorded under the sanction of cross-examination to alleged statements made to the police which are not judicially recorded.*

It is the Judge's duty to make up his mind, while the witness is before him, whether he is a witness of truth or falsehood, and it is only when the Judge sees any reason to distrust his evidence that omission in a police record can become of any importance.

This was an appeal against the conviction and sentence passed by G. J. Monahan, Esq., Sessions Judge of Shahabad, under secs. 147, 148, 395, 326/149 and 324/149, I. P. C., on the 10th October 1911.

The material facts will appear from the judgment.

Mr. K. B. Dutt and *Babu Surendra Nath Ghoshal* for the Appellants.

Mr. Orr, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal from the judgment and sentence of the learned Sessions Judge of Shahabad who differing with the assessors convicted four persons Jung Rai, Keshwar Singh or Rai, Ram Narain and Anjar Abin under secs. 148, 395 and 326 read with 149 and sentenced the first to 10 years' rigorous imprisonment, the others to seven years each.

Originally eight persons were arraigned before him on these charges, but four have

been acquitted though we confess we are unable to appreciate any difference between their cases and those of the present Appellants.

It is alleged that 200 of the tenants of Barsingha, a village in the Ballia District, crossed the Ganges on the day of occurrence and looted the fields of the Suremanpur Burja tenants. It is also alleged that one Bhubandeo Rai (not in custody) pursued one Chegan and speared him killing him instantaneously. Then it is said that Sheogobind who has been tried and acquitted on his establishing a convincing *alibi* pursued Bhola Rai and speared him so that he also died.

Harnarain or Harnandan Rai (P. W. 2) was grievously hurt with a spear so that his dying declaration had to be taken and then the mob disappeared as suddenly as they had come.

There had been already an apprehension of a breach of the peace between the men of Suremanpur Burja and Salempur and so bitter was this quarrel that a police guard had to be posted on the *Chur.* In the meantime, however, some of the Barsingha raiyats had obtained settlement from the Collector of lands in Salempur which appears to be a *khas mahal,* and this annoyed both the Salempur people and the people of Suremanpur Burja who also wanted settlement of these lands.

The defence is that the boundary dispute between Solempur and Suremanpur culminated that day in a fight in which these persons were killed and wounded and that the two sets of villagers continued to implicate Barsingha men. It is found by the Judge that this boundary dispute had not been settled and these are points in this case which convince us that the defence story is true. All the witnesses swear in the clearest way that Sheogobind speared Bhola Rai. There is no room for doubt or escape from this statement and as it has been found to be totally false, this considerably discounts the other evidence as to identification on which the whole case against the Appellants turns. It is not like a case where an offender has been given the benefit of the doubt on showing strong evidence of *alibi* as against a mere allegation of presence in the riot.

The identification made by all the witnesses is discredited by their false charge against Sheogobind, and Bechu Dhobi (P. W. 19) alone is left untouched by it, and it is on his evidence principally that the learned Judge seems to have relied.

Now this Bechu Dhobi was the first person examined by the police and he stated that 200 men had come from Barsingha but gave no names whatever.

The first time any names are said to have been mentioned are by Harnarain at the Chakwad where he was lying wounded, and it seems reasonably open to doubt whether he made such a statement. If he did, he clearly falsely implicated Sheogobind in the murder of Bhola Rai and that same night before the Deputy Magistrate at Lalganj he omitted to mention Jung Rai.

The other witnesses do not appear to have named any one till the 29th March, three days after the occurrence, though Nihara and Guli were with the Sub-Inspector from the first. It is remarkable that the Salempur witnesses admit that they ran away and hid themselves for two or three days. This clearly shows that they were afraid of being implicated in the riot.

The learned Judge nowhere gives his own finding on the truth or falsity of each witness's statement. He relies entirely on the differences in what they say in Court and what they said or are alleged not to have said before the police. We must

JUNG RAI v. THE KING-EMPEROR.

point out that it is exceedingly dangerous to appeal from evidence judicially recorded under the sanction of cross-examination to alleged statements made to the police, which are not judicially recorded.

It is the Judge's duty to make up his mind, while the witness is before him, whether he is a witness of truth or falsehood and it is only when the Judge sees any reason to distrust his evidence that omissions in a police record can become of any importance.

Such findings as this—"It is not clear whether the name of Mahabir appears in the police papers or not"—are wholly irrelevant.

For the prosecution it may be noted that there are two Mahabirs and two Sheogobinds mentioned and that many of the identifications were not by name.

There seems to be a doubt thrown throughout the evidence and the judgment of the learned Judge both as to the place of occurrence and the parties engaged in the quarrel. The place pointed out to the Sub-Inspector by the witnesses and noted by him on his map does not agree with the evidence, nor with the map and *khasras* prepared by the Patwari long before this occurrence for a wholly independent purpose. The Judge raises a cloud of doubt on this, but does not tell us what his own finding is.

His final finding on p. 52 contradicts the oral evidence. But he then starts off again throwing a cloud of doubt on his own finding.

The only finding necessary was that whatever the particular spot was where the crops were being cut, it was undoubtedly south of the lands settled with the Barsingha tenants. If, therefore, the Barsingha people looted those crops they are certainly guilty of dacoity.

But on the other hand the fact that they had no interest whatever in such an act and that they had admittedly come two days before with the Deputy Collector to take over the fields which had been settled with them goes strongly in favour of their defence, and the fact that the real place of occurrence was at some indefinite spot to the south, largely supports the theory, that the boundary dispute between Salempur and Suremanpur was the real cause of the fight and that the Barsingha people had nothing to do with it. There is no doubt that the boundary dispute was still going on and the witnesses have forsworn themselves in totally denying it in evidence. The defence say the occurrence was somewhat earlier in the day. If it was early enough for Sheogobind to have been present, a fact to which the prosecution witnesses have tied themselves, then there was ample time for concoction before the police came.

It is most significant that Bechu Dhobi, a man of Salempur, starts the story that 200 Barsingha men had come across and killed two Suremanpur men and then disappears for two or three days. It is only when the Salempur people found that the Police had accepted this story that they came forward with evidence.

It is inexplicable how 200 persons came across the Ganges in boats and yet no trace of their coming or going appears in evidence. They must have had at least five large boats and those boats must have been seen. Yet the evidence in regard to the only boat spoken of in which Sheogobind and one other man are said to have started from the other side has been disbelieved and in our opinion rightly so.

As regards the loot, the Judge finds there was not much looting. But the only evidence is that some paddy was found cut and admittedly Harnarain and others were

cutting their paddy that day. There is no suggestion that the paddy was irregularly cut and there was no mention of loot to the police.

The witnesses who say that the loot was after the murders are disbelieved. A glance at the table of identifications prepared by the learned Judge shows that Sheogobind's false identification vitiates the identification of every one of the accused, for we have shown that Bechu's evidence coming so late as it does after his first information cannot have any weight.

The argument that it is difficult to believe that a party who had had two men killed and one wounded would make a false charge against other people is negatived in this case by the positive and detailed false accusation against Sheogobind made by Harnarain himself from the very first. It is contended that the defence did not put forward the story of the boundary riot until they came to argue the case, but we find clear cross-examination to the point in the evidence of P. W.'s 1 and 2, and in the written statement (para. 20 to end).

Reading the evidence as a whole we are clearly of opinion that the assessors were right and that the Barsingha people had nothing to do with this occurrence. We accordingly allow the appeals, set aside the convictions and sentences and direct the acquittal and release of the accused.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1247 OF 1914.

JENKINS, C. J.
TEUNON, J.
1914,
9, September.

AKBAR ALI MAHOMED, Accused, Petitioner,
v.
THE KING-EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 110, 122—Sureties, necessity of judicial enquiry before rejecting.

Sureties offered should not be refused except after judicial enquiry under sec. 122 by the Magistrate who has made the order under sec. 110.

This was a Rule granted on the 20th July 1914, against an order of Babu Uma Prasanna Guha, Deputy Magistrate of Jalpaiguri, refusing to accept the sureties offered by the Petitioner who was directed under sec. 110, Cr. P. C., to execute a bond in a sum of Rs. 200 with two sureties for the same amount to maintain good behaviour for one year, an appeal from which order was dimissed by C. W. Jacob, Esq , Deputy Commissioner, on the 6th July 1914.

The material facts will appear from the judgment.

Mr. P. N. Dutt and *Babu Nokuleshwar Mukerjee* for the Petitioner.

No one for the Crown.

The JUDGMENT OF THE COURT was as follows :-

In this case the accused Petitioner had been required to furnish security for good behaviour under sec. 118, read with sec. 110, of the Criminal Procedure Code. Thereupon he offered two sureties, and the matter was referred by the Magistrate to the Police for enquiry. The Police submitted a report to the effect that the sureties were not acceptable; and, proceeding upon that report, the Magistrate refused to accept the sureties. It has been repeatedly pointed out that sureties offered should not be refused except after judicial enquiry by the Magistrate who has made the order under sec. 110—such enquiry to be made under the provisions of sec. 122 of the Criminal Procedure Code. This Rule was therefore granted calling upon the Deputy Commissioner to show cause why the Petitioner

AKBAR ALI MAHOMED *v.* THE KING-EMPEROR.

should not be given an opportunity of showing that the sureties offered were fit to be accepted. No cause has been shown, and on the facts we have stated, we make this Rule absolute and direct that the Magistrate do now hold an enquiry in accordance with law and upon that enquiry decide whether the sureties offered are or are not fit persons.

Pending this further enquiry the sureties offered will be provisionally accepted.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1701 OF 1914.

JENKINS, C. J.	
TEUNON, J.	GULLI SAHU, Accused,
1914,	Petitioner,
Heard,	*v.*
19, November.	THE EMPEROR,
Judgment,	Opposite Party.
20, November.	

Indian Extradition Act (XV of 1903), secs. 7, 15—Surrender of fugitive criminal to State other than Foreign State—Execution by District Magistrate of warrant issued by Political Agent if a judicial act—Jurisdiction of High Court—Criminal Procedure Code (Act V of 1898), sec. 491.

Where a warrant is issued by a Political Agent under sec. 7, its execution by the District Magistrate in accordance with the Act is an executive act, and the High Court cannot interfere in revision with such execution.

The power of the Court to interfere otherwise than by way of revision, e.g., *under sec. 491, Cr. P. C., is untouched by this decision.*

This was a Rule granted on the 16th October 1914, against the order of Mr. A. H. Vernede, District Magistrate of Darbhanga, dated the 19th July 1914, directing the surrender of the Petitioner to the Nepal authorities, an application for a reference of which order to the High Court for revision was rejected by Mr. R. L. Ross, Sessions Judge of Darbhanga, on the 8th September 1914.

The material facts will appear from the judgment.

Messrs. B. Chuckerbutty, K. N. Chaudhuri and *Babu Rajendra Pershad* for the Petitioner.

Mr. Sultan Ahmad, Deputy Legal Remembrancer and *Babu Probodh Chandra Chatterjee* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The applicant, Gulli Sahu, has obtained a Rule calling in question the legality of his arrest under the Indian Extradition Act of 1903. The Rule was granted with some hesitation, for great doubt was felt as to the Court's jurisdiction to interfere in the exercise of its revisional powers. This doubt was well-founded. The powers of the Act were set in motion by the Political Agent in and for the State of Nepal who issued a warrant addressed to the District Magistrate of Darbhanga for the arrest of the Applicant, Gulli Sahu, and his delivery as in the warrant described.

The Applicant is a Nepalese subject, who had fled from Nepal to British Territory. The case against him is that he has committed or is supposed to have committed murder and that is an extradition offence. The proceedings thus fell within sec. 7 of the Act. Sub-sec. 1 empowers a Political Agent to issue a warrant addressed to a District Magistrate for the arrest of a person by whom an offence has been committed or is supposed to have been committed. Sub-sec. 2 provides that the warrant so issued shall be executed in the manner provided by the law for the time being in force with reference to the execution of warrants.

It has not been suggested that we

GULLI SAHU v. THE EMPEROR.

should or could revise what was done by the Political Agent: but we have been asked to interfere with the proceedings of the District Magistrate in British India. But the District Magistrate's sole function was to execute the warrant and, notwithstanding his executive procedure and pronouncement, this in effect is what he has done. And as in so doing he performed in accordance with his legal duty an executive act, we have no power to interfere in the exercise of our revisional powers. That this is the true effect of the Indian Extradition Act, 1903, is, we think, apparent from an examination of its scheme. Chapter II of the Act deals with the surrender of fugitive criminals in the case of Foreign States, and where a requisition is made for such surrender, the Government may issue an order to a Magistrate to inquire into the crime. The method of enquiry is described, and a power to commit the fugitive criminal to prison to await the orders of the Government or to release him on bail is vested in the Magistrate.

Then it is enacted that the Magistrate shall report the result of his enquiry to the Government and a power is given to the Government to refer to the High Court any important question of law. But it rests with the Government to decide as to the surrender of the fugitive criminal, and sec. 5 empowers the Government to stay proceedings under the chapter and to direct any warrant issued under it to be cancelled and the person for whose arrest a warrant has been issued to be discharged.

Chapter III on the other hand deals with the surrender of fugitive criminals in case of States other than Foreign States. Nepal is such a State, so that it is with this chapter that we are concerned. In falling under this chapter a simple procedure is prescribed where proceedings are initiated by a Political Agent. In that case no enquiry is directed, and the determination of the Political Agent is regarded as sufficient subject to the Government's power of interference under sec. 15.

Where, however, a State, not being a Foreign State, itself makes a requisition for the surrender of an accused person, then the procedure of sec. 3, which is in Chapter II, is prescribed including the inquiry and report by the Magistrate. An examination of the whole Act and a comparison of its provisions confirm the view that where a warrant is issued by a Political Agent under sec. 7, its execution by the District Magistrate in accordance with the Act is an executive act and the Court cannot interfere in revision with such execution. There is nothing in this view which in any way conflicts with the power of the Court to interfere otherwise than by way of revision. Thus the power of the Court to interfere under sec. 491 of the Criminal Procedure Code is untouched by this decision, for that is a power not created by the Extradition Act or exerciseable by way of revision, but vested in Presidency Courts to protect the liberty of the subject in appropriate cases whatever may be the occasion of the deprivation, of which complaint is made.

If a fugitive criminal arrested under sec. 7 of the Indian Extradition Act considers himself aggrieved, he can invoke the action of the Government under sec. 15. This Court, however, has no power of revision and so the Rule must be discharged.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]
Rev. No. 96 of 1912.

Holmwood, J.
Sharfuddin, J.
1912,
15, February.

Ram Deo Pande,
Petitioner,
v.
The Emperor,
Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 110—Security for good behaviour—Fresh proceedings after expiration of an order under section if can be based on materials antecedent to the expiration of the previous order.

When after the expiration of the period of a bond for good behaviour taken under sec. 110, Cr. P. C., fresh proceedings are taken against the accused, such proceedings must be confined to facts and circumstances alleged against him after release from his last security.

This was a Rule granted on the 19th January 1912, against the proceedings under sec. 110, Cr. P. C., against the Petitioner now pending before the Court of Mr. W. H. Boyce, Sub-divisional Magistrate, Siwan.

The material facts will appear from the judgment.

Mr. Huq and *Babu Manmotha Nath Mookerjee* for the Petitioner.

Babu Sris Chandra Choudhury for the Crown.

The Judgment of the Court was as follows :—

We think that this Rule must be made absolute on the first ground on which it was issued, namely, that the proceedings are premature. The Police report upon which they are based mentions 17 cases in which the accused has been suspected to have taken part, and eight of those cases, or nearly half, we are surprised to find, took place during the period when he was previously furnishing security. Then there are four cases in which the Police reported that he has been known to have taken part. All four of these cases took place during his previous terms of security, and it is upon these 12 cases with nine other cases which occurred in April, May and June and August 1911, that he is now being arraigned, and the proceedings state that this report makes it appear to the Magistrate that this man is by habit a thief and house-breaker by night, and that he habitually commits extortion and offences involving a breach of the peace. As far as we can see there is no limit of extortion or any offence involving a breach of the peace in this list of cases, and the allegation that besides committing burglary and theft he satisfied his ends by force of *lathis* is extremely vague. Of course when he has had time to show that he has formed the habit of theft and house-breaking by night with extortion and offences involving a breach of the peace since the beginning of January 1911, then on materials confined to the period after his release from his last security, proceedings could, if necessary, be taken under sec. 110 against him. But these proceedings must be confined to facts and circumstances alleged against him after his release from his last security, and to import anything before as evidence of habit would be to lay down that having once been called upon to furnish security he could always on the same evidence be made to continue that security from one term to another. That certainly is not the law.

The principle on which these cases should be tried is laid down in *Junab Ali* v. *The Emperor* (1). We do not mean to lay down in any particular case or in this case, that 15 months is or is not a sufficient period to give a man a *locus poenitentie*. That is not the question. In the particular case there reported the Judges held that this man had not had a sufficient *locus poenitentie*. But this is probably due to the fact that during the

(1) I. L. R. 31 Cal. 783 (1904).

15 months since he came out of jail, there was very little to show that he had continued in his evil courses. But what they did find was that the evil reputation which he had before his imprisonment had still followed him and permeated the evidence of many of the witnesses; and this is what must be avoided. No prejudice can accrue to the Petitioner from anything which he is alleged to have done prior to the beginning of 1911: and therefore we think that these proceedings taken in October 1911 were premature.

If the District Magistrate is of opinion that there is evidence that this man has become a habitual thief and house-breaker since 1st January 1911 and is now a dangerous character from whom security is required, it will be open to him to take proceedings against him. But in that case we think the District Magistrate should himself have the matter enquired into at his own headquarters rather than at Siwan, as it is perfectly clear that the moving spirit in this and other cases are the local zamindars of the Siwan Subdivision.

The Rule is made absolute, and the proceedings of the 11th October 1911 are set aside.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION]

REV. NO. 1414 OF 1914.

JENKINS, C. J. TEUNON, J. 1914, 13, October.	MOHAJAN SHEIKH and anr., Petitioners, *v.* THE EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec 75—Indian Penal Code (Act XLV of 1860), sec. 225—Warrant, seal of Court on, if essential—[illegible] of absence of seal—Arrest made in execution of warrant without seal, if legal

The seal of the Court is essential to the validity of a warrant, and its absence makes the warrant void and an arrest made in execution of such warrant is not legal.

This was a Rule granted on the 14th August 1914, against the order of Babu Atul Gopal Roy, Sub-Deputy Magistrate of Satkhira, dated the 30th June 1914, convicting the Petitioners under sec. 225 (*b*), I. P. C., and sentencing them each to rigorous imprisonment for three months, an appeal from which order was dismissed by Mr. H. A. Street, Sessions Judge of Khulna, on the 22nd July 1914.

The facts of the case are that on the prayer of Madar Sheikh, who was an accused in a case, warrants of arrest with bail were issued against certain witnesses for their examination. Two constables went with the warrants and arrested them. Madar was present, but pleaded that he had not prayed for warrants and then fetched Mahajan who read the warrants and declared that no one would stand bail for the arrested. Mahajan then pushed one constable aside: the arrested persons and Mahajan ran away. The constables returned and lodged first information with the Police. It appeared that the warrant in execution of which the arrest was made did not bear the seal of the Court.

Babu Monmatha Nath Mukherjee for the Petitioners.

The JUDGMENT OF THE COURT was as follows:—

Under sec. 75 of the Code of Crimin Procedure the seal of the Court tial to the validity of a warrant. sence of a seal in this case made warrant void and there consequently wa no legal arrest. We therefore make the Rule absolute. If the Petitioners are on bail, the bail will be discharged; if in custody, they will be released.

Rule made absolute.

THE

Calcutta Weekly Notes.

Vol. XIX.] MONDAY, JANUARY 11 1915. [No. 8.

Contents.

NOTES.

Advocates and Vakils before the Board of Revenue.

A practice has long prevailed in the Board of Revenue that when Advocates of the Calcutta High Court appear before the Member for arguing appeals, they address him while seated in the chair. But when *Vakils* appear, they have to address the Member standing. We think that it is time that this invidious distinction should be done away with. The grant of equal courtesy to the latter cannot possibly affect the prestige or derogate from the dignity of the Board.

Legal and Political Unity of the Empire.

The inaugural Rhodes Lecture delivered in the University of London, with the Lord Chancellor in the Chair, is published in the last number of the *Law Quarterly Review*. The subject was "The Legal and Political Unity of the Empire", and the lecturer, Mr. J. H. Morgan. It is in many respects a very remarkable discourse, and the lecturer very rightly traced the real bond between different parts of the Empire in the justice of its laws and their administration. Naturally the part that has been played by the Judicial Committee of the Privy Council in inspiring confidence in British administration of justice has furnished the author with materials to develop his theory, how this vast Empire may be held together in a common bond of unity. We may hereafter notice his lecture in greater detail, but for the present we shall only place before our readers almost the concluding passages of his lecture. Regarding the founder of the lecture, he says that Cecil Rhodes shared with many bold founders of Empire the apprehension whether the British Empire would some day share the same fate as the Roman Empire.

The lecturer faces the question boldly and answers it thus in equally unfaltering terms:—

"Can it be that such a fate also awaits this Empire of ours? I am bold enough to think it improbable. If I had to distinguish the British Empire from the Empires of the ancient world, I should be inclined to say that the supreme distinction lies in this: she is the nursery of freedom. The Empires of the past were conceived in war and brought forth in slavery; in slavery they arose and through slavery they fell. Their flowering was the efflorescence of decay. Even Rome, so great in the arts of government, never learnt how to adapt the government of a city to the framework of an Empire, and her rights of citizenship were so attenuated by the time of their extension that they ceased to have any political significance. The slightest weakness at the heart was communicated to the extremities, for they had no political life of their own. I have failed in my purpose to-night, if I have not succeeded in conveying to you what has been and is our Imperial policy."

English Companies composed of alien enemies.

We find that in a note on the position of German share-holders in English Companies in the last number of the *Law Quarterly Review* the same view is taken as was taken by us on the same question in the closing numbers of our last volume. A question was raised in the public press in England as to whether Companies incorporated in England, in which almost all the shares are held by Germans, may be regarded as enemy persons. But it is a well-known proposition of law that the corporate person of a Company is never identical with that of the persons composing it. See *John Foster & Sons* v. *Commissioners of Inland*

Revenue, [1894] 1 Q. B. 516, 528; *Solomon* v. *Solomon & Co.*, [1897] A. C. 22, 51. The act of incorporation would give the Company an English domicile. The fact that all the members were aliens would not make any difference. See *Princess Reves* v. *Bos*, L. R. 5 H. L. 176. A company so formed may, during a war between Great Britain and the country of the alien enemy share-holders, lawfully continue trading with other subjects of Great Britain and its colonies and of neutral States. This we never questioned or doubted. But the writer in the *Law Quarterly Review* takes care to conclude in the following terms: "Of course, in the above observations we are not dealing with the subject of paying dividends to share-holders who are for the time being alien enemies or with the position in which they stand as regards holding or being represented at meetings of the company." It is on this last ground that we questioned the propriety of such companies carrying on any part of their business under a Board of Directors partly or wholly reconstituted since the outbreak of war. The State may, perhaps, authorise the business to be carried on by a Board of Trustees appointed under its authority, or the Court may appoint a Receiver to take charge of and carry on the business of the company within limitations prescribed by it.

Correspondence.

ATTORNEYS' LIBRARY,
HIGH COURT, CALCUTTA.
Dated the 5th January 1915.

FROM

F. M. LESLIE, ESQ.,
Hony. Secy., Incorporated Law Society of Calcutta,

To

THE EDITOR,
Calcutta Weekly Notes.

DEAR SIR,

May I ask you to allow me the use of your columns to make known to the Profession in all its branches the decision of the Court upon a point of practice which has remained unsettled for many years? I enclose a copy of a letter received by me to-day from the Registrar together with copies of the enclosures therein referred to for the favour of publication in your journal. The thanks of the Profession are due to Mr. Hechle for so kindly placing the Court's decision in this matter before its members.

Yours faithfully,
F. M. LESLIE,
Hony. Sec

No. 12.

FROM

J. H. HECHLE, ESQ.,
Registrar, High Court, C
Origi

To

THE HONORARY SECRETARY,
Incorporated Law Society
Calcu

Dated 5th January 19

Present:
The Hon'ble MR. JUSTICE CHITTY.

SIR,

I am directed by His Lordship Mr. Justi Chitty to send you, for the information of t Profession, a note upon a question of practi which was put up by the Deputy Registr before His Lordship together with His Lor ship's ruling thereon.

I shall be much obliged if you will be go enough to bring the matter to the no e of the Profession in such manner as you think best, so that the practice there laid down may be followed in future.

I have the honour to be,
SIR,
Your most obedient servant
J. H. HECHLE,
Registrar

Suits Nos. 433 of 1907, 1092 and 1093 of 191 and 1044 of 1911.

Note for the HON'BLE MR. JUSTICE CHITTY.

Hoorunnessa Bibee
v.
Abu Tyeb Md. Mehd
and other causes.

This application involves a question of prac tice in respect of which there has been a differ ence of view in the past.

Where money in Court stands to the credi of one suit and the Plaintiff in another suit has by reason of being an attaching creditor o mortgagee or otherwise, an interest in suc money and desires the fund to be transferred t the credit of his suit in order to be dealt wit therein, he has to make an application *eithe in the suit in which the money stands* (whic will hereafter be referred to as "Suit A") o *in the suit to which the money has to be trans*

ferred (which will hereafter be referred to as "Suit B") for the order for transfer. Orders have been made in respect of both classes of applications and the moneys have been transferred. The question is, which is the proper course.

The following reasons may be given why the application should be made in suit A:—

(1) It is desirable that where an order is made dealing with funds, it should be made in suit A rather than in suit B; otherwise there will be nothing on the record of suit A to show what has happened to the fund, but a reference must be made to the Accountant-General's office to ascertain how the fund has been dealt with.

(2) Before money is transferred from the credit of suit A, the parties to such suit should have notice of the application to enable them to place their objections (if any) before the Court. When the application is made in suit B, the full cause title of suit A will not ordinarily appear on the papers, and it will not be possible for the Court to see if all the necessary notices have been given to the parties interested in suit A. Such notices are specially necessary in cases where some of the Defendants are puisne mortgagees, or otherwise have liens or claims on the fund and who may object to the money being dealt with in any other suit. If the money were transferred to suit B without notice to them, when an application came to be made for payment out of Court of the fund standing in suit B, the interests of the parties to suit A would be overlooked, if they happened not to be parties to suit B; for, under Chapter XVII, rule 37, if the Registrar's certificate shows that no person has applied for execution of a decree for money against the judgment-debtor (*i.e.*, the judgment-debtor in suit B), the application would be *ex parte*.

The argument against the application for transfer being made in suit A is that often the Plaintiff in suit B is not a party to suit A and would have no *locus standi* to apply in suit A. The answer to this is that he should be permitted to apply in suit A, provided he proves his interest in the fund. Such proof is equally necessary where the application is made in suit B.

The present application is one in suit B and as usual the full cause title of suit A is nowhere given. The applicant's attorney however points out that in para. 4 is set out who the original Defendant in suit A was, and the persons substituted in her place on her death, and that para. 5 shows all such persons are parties in suit B. This statement may be considered to be sufficient to meet the second objection to the application being made in suit B, but does not meet the first objection above stated.

Whatever view the Court takes in the special circumstances of the present case, it is very desirable that the practice on the point should be settled.

MAURICE REMFRY,
Dy. Registrar.

17th December 1914.

I think that the application should be made in suit A, and that this course should be followed in the future. In view of the doubt which has hitherto existed as to the correct practice, the present application may be allowed to pass as presented.

C. W. CHITTY.

18th December 1914.

Reviews.

CODE OF CRIMINAL PROCEDURE. *By Guy P. Boys, B.A., LL.B., Bar.-at-Law. Published by Butterworth & Co. (India), Ld., 6 Hastings Street, Calcutta. Price Rs. 18.*

This is an admirably annotated edition of the Code of Criminal Procedure. The book is published in two volumes: Volume I contains the text of the Code and Volume II the commentary thereon. The notes are very carefully prepared and always concise and instructive. The special feature is that in annotating the important sections, the author has taken care to trace the previous stages of the law as contained in the previous Codes, and tried to explain the changes in the light of reported decisions. Throughout the book, there is abundant proof of careful editing, and we have no doubt, the book will prove useful to the Bench and the Bar. The arrangement of the headings under which the commentary on the important sections has been dealt with shows at a glance the hand of a practical lawyer intimately familiar with the provisions of the Code. In the Appendix, the sections of the Charter Act and the Letters Patent which can have a possible bearing on the Code of Criminal Procedure have been annotated. The notes on sec. 15 of the Charter Act are very useful. The Appendix also contains some very important matter in the notes grouped together under the headings Notice and Opportunity to Show Cause, Appeal to Privy Council, Renewal or Revival of Proceedings, Stay of Proceedings. The splitting up of the text and the

commentary into two separate volumes may not, however, commend itself to the busy practitioner. On the whole, the book is one which every lawyer will find useful, and regard being had to the amount of matter contained in the book, the price is not high.

THE LAWYER'S COMPANION DIARY, 1915. *Published by the Law Printing House, Madras. Price 8 annas.*

The above diary is intended principally for lawyers. Besides containing such general information as would be useful to all, it contains a mass of legal information which members of the legal profession will find particularly useful. The important provisions of such legislative enactments as a practitioner has to refer to almost daily in his practice are embodied, and an alphabetical list of the Imperial Acts in daily use is given. The diary which allots one page to a day is handy and neatly executed.

THE LAWYER'S OFFICIAL DIARY, 1915. *Published by the Law Printing House, Madras. Price 14 annas.*

This diary which is brought out in the brief size with half a page for a day is also intended for the use of lawyers. It embodies the special features of its sister-publication noted above. On account of its shape, it will suit requirements and tastes for which the one just noticed may not equally answer.

Notes of Cases

CALCUTTA HIGH COURT

Recent decisions not yet reported

(The important cases to be fully reported hereafter)

CIVIL APPELLATE JURISDICTION. Before CHAPMAN, J. APPEALS FROM APPELLATE DECREES Nos. 128, 129, 130 AND 131 OF 1912. PRAMATHA NATH MUKHERJEE AND OTHERS, Plaintiffs, Appellants *v.* KALIGUNGA DEVI AND OTHERS, Defendants, Respondents. 26th November 1914.

Second appeal—Settlement of fair and equitable rent—Bengal Tenancy Act (VIII of 1885), secs. 50 (3), 105, 109A (3)—Amalgamation no new contract.

These four appeals arose out of suits for the settlement of a fair and equitable rent under sec. 105 of the Bengal Tenancy Act. The suits were brought by the landlords upon whose application the record-of-rights had been prepared. The landlords appealed to the High Court. A preliminary objection was taken that no appeal lay and the provisions of sec. 109A, sub-sec. (3), were relied upon.

In these cases the decisions involved and in fact included a decision to the effect that the tenants were permanent tenure-holders at a fixed rent.

Held, that the second appeal lay.

Pirthi Chand v. *Basarat Ali* [I. L. R. 37 Cal. 30 (40) 2B], referred to.

The appeals Nos. 128, 129 and 130 related to one tenancy and appeal No. 131 related to another. In appeals Nos. 128 to 130 the first contention was that the presumption permitted by sec. 50 of the Bengal Tenancy Act was improperly employed in these cases inasmuch as it was found that the tenancy was the result of an amalgamation of three separate tenancies - an amalgamation which took place subsequent to the permanent settlement. Both the lower Courts treated the tenancy as a tenure. The argument was that the saving provisions of sub-sec. (3) of sec. 50 were expressly confined to lands held by a raiyat, and that with reference to that sub-section where a tenure had been created by the amalgamation of separate tenures subsequent to the permanent settlement, the provisions of sec. 50 did not apply. The Appellants relied upon the case of *Udoy Chandra* v. *Nripendra Narayan Bhup* (I. L. R. 36 Cal. 287), while the Respondent relied upon the case of *Pirthi Chand* v. *Sheik Hazari* (8 A 1889 of 1908) decided by Mr. Justice Chatterjee.

The lower Courts held that when this amalgamation took place, no new contract was ever entered into by the parties.

Held, that the incident of amalgamation did not disturb the relationship between the parties in any essential matter and the judgment of the lower Appellate Court was correct.

In Appeal No. 131

Held, that the question whether the land was liable to pay any rent or not, was a question which required to be and ought to have been determined in the proceedings under sec. 150 of the Bengal Tenancy Act.

Babus Surendra Chandra Sen and *Trailakhya Nath Ghose* for the Appellants.

Babu Monmotho Nath Mukherjee for the Respondents.

A. T. M. *Appeals dismissed.*

[PRIVY COUNCIL.]
[APPEAL FROM ALLAHABAD.]

LORD PARKER OF WADDINGTON
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
Heard, 27 and 30, April.
Judgment, 18, May.

SHOHARAT SINGH and ors., Appellants,
v.
MUSAMMAT JAFRI BIBI, Respondent.

*Mahomedans—Shiahs—*Muta *and* nikah *marriage, different consequences—Proof of marriage—Cohabitation—Declaration by the man—Appreciation of evidence in Trial and Appellate Courts, when neither has seen witnesses—Circumstances of suspicion calling for scrutiny—Examination of evidence by Judicial Committee—Deference to experience of High Court Judges—Suit by one of several co-heirs—The right of others time-barred—Decree for share only for Plaintiff and for the balance for Defendants.*

A muta *marriage is, according to the law which prevails among Shiahs, a temporary marriage, its duration being fixed by agreement between the parties. It does not confer on the wife any right or claim to her husband's property, but children conceived, while it exists, are legitimate and capable of inheriting from their father.*

A nikah *marriage is a religious ceremony, and confers on the woman the full status of wife, and children born after it are legitimate.*

The term of a muta *marriage may from time to time be extended by agreement.*

Where it was alleged by the Plaintiff, who claimed to be the only legitimate child and sole heiress of M, a Shiah Mahomedan, that her (the Plaintiff's) father, M, and mother, A, had lived together as man and wife for many years, but that they were married in nikah *form only 1½ years before her birth, and it was urged in defence that she was illegitimate and that if she was legitimate, so were two other daughters of M and A, born before the Plaintiff, and that in the latter case Plaintiff could recover one-third only of the inheritance, the claim of her sisters being time-barred, and in evidence the Plaintiff tendered a deed of dower executed by the father at the time he was alleged to have contracted the* nikah *marriage in which however M had expressly declared that he had contracted* muta *with A in the beginning but now for reasons stated in the deed had married her in* nikah *form, and examined witnesses who deposed to the marriage ceremony taking place on the same date; and the Subordinate Judge (who however had not seen the witnesses examined) disbelieved the witnesses and held the deed to be a forgery, but on appeal the High Court having before it additional evidence of considerable importance held that the deed was genuine and that the* nikah *marriage had been performed as deposed to by the witnesses:*

Held, *by the Judicial Committee, after a careful consideration of the evidence, that they ought not to reverse the High Court's findings, though they thought there were good reasons why both the deed itself and the evidence of the witnesses in question ought to be looked upon with suspicion and scrutinised with great care. The Judges of the High Court who came to these findings had necessarily a large experience in matters of this nature, and the Subordinate Judge had no more opportunity than they of seeing and observing the demeanour of the witnesses, and they on the other hand had evidence before them which was not before the Subordinate Judge.*

Held, *also, on the evidence, that if the deed were treated as valid and the Plaintiff's witnesses as reliable, there was considerable evidence that cohabitation of M and A commenced in a* muta *marriage, and that in the absence of evidence to the contrary such marriage must be taken to have*

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subsisted throughout the period which covered the conception and birth of Plaintiff's sisters.

That their claim as such being statute-barred, the expiration of the period of limitation would accrue for the benefit of the Defendant and not for the benefit of the Plaintiff.

The main facts of the case sufficiently appear from their Lordships' judgment. Muhammad Kazim, a Shiah, died leaving a widow, Murtazair, and a sister who took possession of his estate, and made several alienations thereof to the Defendants-Appellants. He had been living with another woman also, Musammat Achchhi, by whom he had several children including three daughters who survived him. The Plaintiff Jafri Bibi now claimed 7/8ths of the estate from the Defendants. She based her case on the following *kabinnama* :—

"I, Saiyid Muhammad Kazim, son of Saiyid Kurban Ali, deceased, resident of mohalla Rahmat, city Gorakhpur, do hereby declare that Musammat Achchhi Bibi has been living with me for some years past and I contracted *muta* with her in the beginning. Owing to our mutual love and affection I had intended long ago performing *nikah* with her, but owing to certain circumstances as well as to the unwillingness of some of the members of the family I could not do so. A suit was recently instituted on my behalf against Achraj Nath, patwari, in which my deposition was taken. In that deposition I did not consider it advisable to admit my *muta* with Achchhi Bibi. She came to know about this and owing to which a disagreement took place between us. As I had made up my mind before this also to perform *nikah* with her and it was also necessary at present to remove the disagreement between us, therefore I, the executant, while in sound health, in full possession of my senses, without any undue influence and coercion and of my own free will and accord, have performed *nikah* with Achchhi Bibi at a dower of Rs. 50,000 (fifty thousand), half of which amounts to Rs. 25,000 (twenty-five thousand), according to Muhammadan Law at a general meeting at which several *raises* and respectable residents of the city were present. The aforesaid dower-debt is in every way payable by me personally and by my movable and immovable property. Hence, I have executed this paper as a memorandum of the dower and *nikah* that it may be of use in time of need."

The defence was that the *kabinnama* was not genuine, that there was no *nikah*, and that in any case the *kabinnama* shewed that there existed between the parties a *muta* marriage prior to the *nikah*, and consequently the Plaintiff was entitled to one-third of her claim. The Subordinate Judge found that the *kabinnama* was not proved. As to the *muta* he observed :—

"It is contended on behalf of the Defendants that these daughters were born after *muta* as shown by the evidence of the witnesses examined by the Plaintiff, but there is no evidence to show that *muta* marriage subsisted when they were born. *Muta* marriage is contracted for a definite period (*vide* Shama Charan Sirkar's Muhammadan Law, Tagore Law Lectures, 2nd edition, pp. 373 and 377). There is no evidence on the record to show, if any *muta* marriage was contracted between Saiyid Muhammad Kazim and Achchhi Bibi, for what period it was so contracted."

He accordingly dismissed the suit. The High Court (Sir John Stanley, C. J., and P. C. Banerji, J.) found that the *nikah* and the *kabinnama* were proved. They dealt with the *muta* as follows :—

"It is next contended on behalf of the

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Defendants-Respondents that as it was alleged that a *muta* marriage took place between Muhammad Kazim and Achchhi Bibi and that Muhammad Kazim left two other daughters by Achchhi Bibi, the Plaintiff can only get a third share of the property claimed by her. As to this it may be observed, in the first place, that both parties deny that a *muta* marriage took place. In the next place, there is nothing to show that the *muta*, which was only a temporary marriage, continued at the date of the birth of the two daughters, Anwari and Asghari. The witness, Moghal Jan, their own aunt, states that both of them were the illegitimate children of Muhammad Kazim. Asghari and Anwari therefore are not entitled to any part of the estate and the Plaintiff is the sole heir to the property left by Muhammad Kazim."

Hence this appeal.

Mr. L. DeGruyther, K. C., and *Mr. Bhugwandin Dubé* for the Appellants submitted that the finding of the Subordinate Judge as to the *nikah* and the *kabinnama* was right. There was no satisfactory proof of the performance of the *nikah* and the execution of a *kabinnama* was not common in Bihar and the United Provinces. (Ameer Ali's Mahomedan Law, Vol. 2, pp. 326 and 329.) In any case, if the *kabinnama* was genuine, the *nikah* followed the *muta*, and the Plaintiff was entitled to only one-third of the properties claimed by her.

Mr. G. R. Lowndes, for the Respondent, submitted that the Subordinate Judge had not seen the witnesses, and that the experienced Judges of the High Court had found that the *kabinnama* bore the genuine signature of Muhammad Kazim. The finding of the High Court was right. As to the *muta*, both the Courts below had held against the Defendants' contention.

Mr. L. DeGruyther, in reply, referred to Field's Law of Evidence, p. 68, as to the value of oral evidence in India.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PARKER OF WADDINGTON.—The questions which arise for decision on this appeal are substantially questions of fact only. Was Muhammad Kazim ever married to Achchhi Bibi, and, if so, when, and were there any children of the marriage? There is no doubt that Muhammad Kazim left three daughters by Achchhi Bibi him surviving, of whom the Plaintiff was the youngest, and that those three daughters, if legitimate, were entitled to succeed to his property as co-heirs. But the Defendants to the action (the now Appellants) allege that they were illegitimate, or alternatively that if the Plaintiff was legitimate, so also were her sisters, so that the Plaintiff was entitled to succeed to one-third only of her father's property. The Plaintiff (the now Respondent) alleges on the other hand that although her father and mother lived together as man and wife for many years, they were married about 1½ years before she was born and not earlier, that she therefore was his only legitimate child.

The Plaintiff tendered in proof of the marriage of her parents a deed said to have been executed by Muhammad Kazim on the 11th April 1881, a translation of which will be found at page 90 of the record, and also the depositions of several witnesses who deposed to the marriage ceremony having taken place in their presence about the same date. The Subordinate Judge was of opinion that the deed was a forgery, and that these witnesses were not telling the truth. The High Court having before it additional evidence of considerable importance came to a contrary con-

clusion, holding that the deed was genuine and that the marriage ceremony had been performed as deposed to by the witnesses. The present appeal is from this decision of the High Court.

The deed in question is a deed of dower. In it Muhammad Kazim, who was a Mahomedan of the Shiah sect, declared that Achchhi Bibi had been living with him for some years past, and that he had contracted *muta* with her in the beginning; that owing to their mutual love and affection he had long intended performing *nikah* with her, but owing to certain circumstances, as well as to the unwillingness of some members of his family, he could not do so; that a suit was recently instituted on his behalf in which his deposition was taken; that in this deposition he had not considered it advisable to admit his *muta* with Achchhi Bibi; that she came to know of this, and by reason of it a disagreement took place between them; that as he had made up his mind before this to perform *nikah* with her, and as it was also necessary to remove the disagreement between them, he had of his own free will and accord performed *nikah* with Achchhi Bibi at a dower of Rs. 50,000, at a general meeting at which *raises* and respectable residents of the city were present; hence he had executed that deed as a memorandum of the dower and *nikah* that it might be of use in time of need.

A *muta* marriage is, according to the law which prevails among Shiahs, a temporary marriage, its duration being fixed by agreement between the parties. It does not confer on the wife any right or claim to her husband's property, but children conceived while it exists are legitimate and capable of inheriting from their father. A *nikah* marriage is a religious ceremony, and confers on the woman the full status of wife, and children born after it are legitimate.

If the deed in question be a genuine deed, and the statements in it be taken as true, then not only was there a *nikah* marriage between Muhammad Kazim and Achchhi Bibi at or about the time of its execution, but their cohabitation originated in a *muta* marriage. There is no evidence as to the original term for which this *muta* marriage was contracted, but such term, whatever it was, may from time to time have been extended by agreement, and, in their Lordships' opinion, if it be once proved that the cohabitation originated in a *muta* marriage, the proper inference would, in default of evidence to the contrary, be that the *muta* continued during the whole period of cohabitation.

Besides the deed itself, there is ample corroborative evidence of the *nikah* marriage there referred to, if the witnesses called to depose to the actual ceremony are treated as worthy of credit. There is also some corroborative evidence of the *muta* marriage.

After careful consideration of all the evidence, their Lordships have come to a conclusion that they ought not to reverse the findings of the High Court as to the genuineness of the deed of dower or the credibility of the witnesses who deposed to the celebration of the *nikah*. The Judges who were parties to these findings have necessarily a large experience in matters of this nature. The Subordinate Judge had no more opportunity than they had of seeing and observing the demeanour of the witnesses, and they on the other hand had evidence before them which was not before the Subordinate Judge. No doubt, as pointed out by the learned Counsel for the Appellants, there are good reasons why both the deed itself and the evidence of the witnesses in question ought

to be looked upon with suspicion and scrutinised with great care. Their Lordships do not think it necessary to go into these reasons. It is enough to say that, after scrutinising the evidence with the greatest care, they do not see their way to disturb the findings of the Court below.

There is, however, one matter which does not appear to have been considered by the High Court with the attention which it deserved, and that is the question of the *muta* marriage. If the deed be treated as a good and valid deed, and the Plaintiff's witnesses as reliable witnesses, there is considerable evidence that the cohabitation of Muhammad Kazim and Achchhi Bibi commenced in a *muta* marriage, and if this be so, in default of evidence to the contrary, such marriage must be taken to have subsisted throughout the period which covered the conception and birth of the Plaintiff's two sisters. These sisters would thus be co-heirs with the Plaintiff of their father's property. It is true that their claim as such is statute-barred, but the expiration of the period of limitation would accrue for the benefit of the Defendants in the action (the now Appellants), and not for the benefit of the Plaintiff (the now Respondent). In their Lordships' opinion, the proper conclusion on the assumption that the *nikah* marriage took place as alleged, was in favour of a *muta* marriage having also taken place, and of the legitimacy of the Plaintiff's sisters, in which case the Plaintiff was entitled to one-third only of what she has recovered under the order of the High Court. In their Lordships' opinion the case should be remitted to the High Court to be dealt with on this footing; the order must be varied in this respect, with liberty to either party to apply to the High Court to vary the order as to costs; and there should be no costs of this appeal which has in part succeeded and in part failed. And they will humbly advise His Majesty accordingly.

Solicitors: *Pyke, Parrott & Co.*, for the Appellants.

Solicitors: *Barrow, Rogers* and *Nevill*, for the Respondent.

B. D. *Appeal allowed in part.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3103 OF 1910.

N. R. CHATTERJEA, J.
WALMSLEY, J.
1913,
Heard, 9 and 15, July.
Judgment, 16, July.

LAL BAHADUR SAHI & ors., Plaintiffs, Appellants,
v.
MR. MACKENZIE, Defendant, Respondent.

Zurpeshgi lease—Occupancy right, raiyati interest, acquisition o —Previous possession as raiyat—Subsequent zurpeshgi lease, effect of.

The Plaintiffs' suit was for recovery of possession of land which had been given in zurpeshgi *to the Defendant for a term of 15 years from 1301 to 1315 F. S., the terms of the* zurpeshgi *being as follows :—" It is desired that the said sahib ticcadar should take possession of the said land, make proper cultivation himself or get it cultivated by others, grow indigo seeds or any other indigo crop by using the land as his* khas zerait *or by settling the same with tenants according to his own desire and shall continue appropriating the proceeds thereof till the term of the ticca. He shall year by year deduct the said fixed* jama *in payment of the principal and interest of his* zurpeshgi *as per account given below and shall pay the remainder, the amount of lessor's rights payable to us, towards the end of the term of the ticca on taking receipts therefor from us. He shall conveniently cut and recover the indigo crops grown and standing on any quantity of land in 1315 F. S., when the term of the ticca*

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pottah comes to an end, and shall pay ten annas rent for 1316 F. S. at Rs. 6-3-0 per bigha and shall give up possession of the said land."

Held—*That the* zurpeshgi *pottah did not create any raiyati interest in the Defendant, far less a right of occupancy, and on the expiry of the term of the pottah the Plaintiffs were entitled to get* khas *possession.*

That a raiyat by taking a zurpeshgi *lease of land of which he was previously in possession as a raiyat does not lose his raiyati status or divest himself of his right to acquire a right of occupancy in the land.*

This was an appeal preferred on the 13th September 1910 against the decree of Babu Prasunno Kumar Gupta, Subordinate Judge of Muzaffarpur, dated 16th June 1910, affirming that of Babu Lal Behary Bhaduri, Munsif of that place, dated 11th January 1910.

The facts will appear from the judgment.

Babu Karunamoy Bose for *Babu Khettra Mohan Sen* for the Appellants.

Babu Samatul Ch. Dutt for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit brought by the Plaintiffs to recover *khas* possession of 10 bighas of land which had been given in *zurpeshgi* to the Defendant for a term of 15 years from 1301 to 1315 F. S. The Plaintiffs alleged that Rs. 600 was stated in the deed to be the *zurpeshgi*; but, as a matter of fact, only Rs. 259 was paid to them, that the said amount had been satisfied out of the rent of the land fixed by the *zurpeshgi* pottah and that they were entitled to possession of the land and mesne profits after the expiry of the term of the lease and to the rent reserved from the year 1313 F. S. The Courts below dismissed the suit.

It appears that the shares of the Plaintiffs Nos. 2 and 3 in the land in dispute were sold in execution of a mortgage decree and purchased by two persons Mathura and Bankey. These persons were opposed by the Defendant in obtaining possession of the land. They thereupon brought a suit, to enforce their mortgage lien, against the Defendant, and, in that suit, Bhola Sahi, the Plaintiff No. 2, and Sheo Nandan Sahi, the husband of the Plaintiff No. 3, were made parties. That suit was compromised between Mathura and Bankey on the one hand, and the present Defendant on the other, and the former recognised the latter as the occupancy raiyat of the land. Subsequent to the institution of the present suit and on the 19th December 1909, Mathura and Bankey executed a deed of disclaimer in favour of Bhola and Sheo Nandan's widow (the Plaintiffs Nos. 2 and 3), but as the deed did not confer any right on them at any time previous to its execution, the learned Subordinate Judge held that it must be considered that they had no right when this suit was instituted. Having found that the Plaintiffs Nos. 2 and 3 had no right to sue, the Subordinate Judge arrived at the conclusion that the Plaintiff No. 1 was not entitled to obtain a partial ejectment to the extent of his share and that the collection in respect of his share not being shown to be separate, he was also not entitled to recover in this suit his share of the rent. The Plaintiffs have appealed to this Court.

So far as the Plaintiffs Nos. 2 and 3 are concerned, we are of opinion that the decree of the lower Appellate Court must be confirmed; but, as regards the Plaintiff No. 1, we think that he is entitled to get possession to the extent of his share, if there was no tenancy created by the *zurpeshgi*.

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The lands in suit were given in *zurpeshgi* on the 3rd June 1893 at a uniform annual rent of Rs. 61-14-0 for a term of years from 1301 to 1315, the *zurpeshgi* being stated to be Rs. 600 and bearing interest at 8 annas per cent. per mensem to be repaid by means of the *sadhawa-patawa* to the Defendant. The material terms of the document are as follows :—" It is desired that the said sahib ticcadar should take possession of the said land, make proper cultivation himself or get it cultivated by others, grow indigo seeds or any other indigo crop by using the land as his *khas zerait* or by settling the same with tenants according to his own desire and shall continue appropriating the proceeds thereof till the term of the ticca. He shall year by year deduct the said fixed *jama* in payment of the principal and interest of his *zurpeshgi* as per account given below, and shall pay the remainder, the amount of lessor's right payable to us, towards the end of the term of the ticca on taking receipt therefor from us. He shall conveniently cut and recover the indigo crops grown and standing on any quantity of land in 1315 F. S. when the term of the ticca pottah comes to an end and shall pay 10 annas rent for 1316 F. S. at Rs. 6-3-0 per bigha and shall give up possession of the said land." It has been contended on behalf of the Respondent that a right of occupancy, at any rate, a raiyati interest was created by this pottah, and reliance has been placed upon the case of *Ramdhari Singh* v. *M. H. Mackenzie* (1). We are of opinion, however, that the *zurpeshgi* pottah did not create any raiyati interest in the Defendant. In the case of *Bengal Indigo Co.* v. *Raghubar Das* (2), the Judicial Committee of the Privy Council with reference to certain *zurpeshgi* pottahs in that case observed as follows :—

"Their Lordships see no reason to differ from the views expressed by the learned Judges of the High Court to the effect that the leases in question were not mere contracts for the cultivation of the land let; but that they were also intended to constitute, and did constitute, a real and valid security to the tenant for the principal sums which he had advanced and interest thereon. The tenant's possession under them was, in part at least, not that of cultivators only, but that of creditors operating repayment of the debt due to them by means of their security." We think that those observations equally apply to the lease in the present case. In another case, *Ram Khelawan Ray* v. *Sambhoo Ray* (3), where the Plaintiff granted to the Defendant a *zurpeshgi* pottah for five years which provided that, with the exception of one rupee which was to be paid yearly to the proprietors, the whole of the rent for five years was to be taken by the *zurpeshgidars* on account of the profits of the *zurpeshgi*, that the *zurpeshgi* money, a sum of Rs. 499, must be repaid at the end of five years and that, if it was not so paid, the *zurpeshgidars* would, by virtue of the deed, remain in possession until the payment of the *zurpeshgi*, and the deed would continue in force until such payment, it was held that the deed did not create a raiyati tenancy, and reference was made to the Privy Council case cited above. These two cases were considered in the case of *Ramdhari Singh* v. *Mackenzie* (1), but the learned Judges who decided that case distinguished them. The Privy Council case was distinguished on the ground that the area of the land in that case exceeded 100 bighas. That appears to be so; but then the Privy Council made the observations which we have already cited, which go to show that,

(1) 10 C. W. N. 851 (1905).
(2) I. L. R. 24 Cal. 272 (1896).
(3) 2 C. W. N. 758 (1898).

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in the opinion of their Lordships, where a lease is not a mere contract for the cultivation of the land let, but is also intended to constitute and does constitute a real and valid security to the tenant for the sum advanced, it cannot be made the foundation of a claim to a raiyati interest. The second case was distinguished on the ground that the whole of the rent was paid in advance as *zurpeshgi*; but, as a matter of fact, in that case a portion of the rent, though a very small amount (namely, one rupee), was to be paid yearly to the proprietor as rent and the remaining amount was to be appropriated by the *zurpeshgidars*. However that may be, it appears that, in the case of *Ramdhari Singh* v. *M. H. Mackenzie* (1) the lease (which was for nine years) provided that the *zurpeshgi* advance was to be paid off in four years and that for the following years rent was to be paid every year, and it was found that the Defendant had been holding the land as raiyat for more than 12 years; and the case, therefore, is distinguishable from the present. We agree, so far, with the view taken in that case that a raiyat by taking a *zurpeshgi* lease of land of which he was previously in possession as a raiyat does not lose his raiyati status, or divest himself of his right to acquire a right of occupancy in the land. In this case, we are of opinion that, having regard to the terms of the *zurpeshgi*, no raiyati interest was created and that, on the expiry of the term of the pottah, the Plaintiffs were entitled to get *khas* possession. It has been contended on behalf of the Respondent that the Defendant set up a raiyati interest previous to the *zurpeshgi*. It is not expressly set out in the written statement and, although there was an issue on the point, it does not appear from the judgments that any evidence was adduced upon it. Mathura and Bankey, it is true, recognised the Defendant as having rights of occupancy; but that was by a compromise in the suit to which we have already referred. The Defendant must, therefore, be taken to be a raiyat with rights of occupancy so far as the Plaintiffs Nos. 2 and 3 are concerned. The appeal of the Plaintiffs Nos. 2 and 3 must, therefore, fail.

The learned pleader on behalf of the Respondent, however, says that there is evidence on the record to show that the Defendant had a raiyati interest prior to the date of the *zurpeshgi*. Under the circumstances, the decree of the lower Appellate Court in so far as it relates to the share of the Plaintiff No. 1 is set aside and the case remanded to that Court. The lower Appellate Court will decide upon the evidence on the record whether the Defendant had any raiyati interest in the land in suit prior to the date of the *zurpeshgi*. If the question is decided in favour of the Defendant, the suit will have to be dismissed. If, on the other hand, it is decided against him, then the Plaintiff No. 1 will be given a decree for *khas* possession to the extent of his one-third share jointly with the Defendant. The Court below will also decide the question whether any rent reserved by the *zurpeshgi* was due to the Plaintiffs, and, if so, it will give a decree to the Plaintiff No. 1 to the extent of one-third. It will further decide the question of mesne profits to the extent of the share of the Plaintiff No. 1. As regards mesne profits, the parties will, of course, be entitled to adduce evidence.

Each party will bear his own costs of this appeal. The costs of the lower Courts as between the Plaintiff, No. 1 and the Defendant will abide the result.

(1) 10 C. W. N. 351 (1905).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 145 OF 1910.

D. CHATTERJEE, J.
WALMSLEY, J.
1914,
Heard,
1, July.
Judgment,
2, July.

AMBIKA PROSAD SINGH, Defendant, No. 1, Appellant,
v.
PARDIP SINGH and ors., Plaintiffs, Respondents.

Civil Procedure Code (Act V of 1908), Or. XLI, r. 4—Appeal by one of several Defendants—Decree by High Court enuring to the benefit of all the Defendants.

One only of several Defendants appealed against the final decree in a suit for partition. The appeal was against the whole decree, and one of the grounds of appeal was that the costs before the preliminary decree should not have been decreed in favour of the Plaintiff:

Held—*That the fact that the portion of the decree which dealt with the question of the incidence of costs was severed so as to make each party of Defendants liable for the costs allocated against it did not prevent the application of Or. XLI, r. 4, C. P. C., and the High Court could make a decree in this respect that would enure to the benefit of all the Defendants.*

This was an appeal preferred on the 11th April 1910 against a decree of Babu Charu Chandra Mukherjee, Subordinate Judge of Darbhanga, dated the 22nd December 1909.

The facts of the case will sufficiently appear from the judgment.

Babu Gonesh Dutt Singh for the Appellant.

Babus Jogesh Chandra Ray, Rajendra Chandra Guha, Kulwant Sahay and Anilendra Nath Ray Chaudhury for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for the partition of a mauza called Pataila in which the parties have different shares. The Defendant No. 1 appeals against the final decree on two grounds : *first*, that the allotment of shares is improper, and, *secondly*, that the costs before the preliminary decree should not have been decreed in favour of the Plaintiff.

As regards the first point, we think that the Appellant has a good ground for complaint. The Commissioner allowed him one block to the north : but the learned Judge has split that block up into three and allotted him the one farthest from his house. We think that he should have his portion of the northern block as near as possible to his house, that is to say, he will have his northern block from the north-east commencing from Nos. 1852, 1860, 1861 and 1862 and go westwards so as to make this block equal in value with the block which has been allowed him to the north-west. Defendant No. 5 will get the block to his west, and Defendants Nos. 2 to 4 will get the block to the west of Defendant No. 2 The Appellant will retain his eastern and south-western blocks, and the allotment of blocks will be altered accordingly.

The next question is as to the costs. It is contended that the costs before the preliminary decree should not have been allotted to the Plaintiff, and the cases of *Shyama Soondari* v. *Jardine Skinner* (1), and *Dildar Ali Khan* v. *Bhawani Singh* (2) are quoted in support of this contention. As the appeal is by one of the Defendants only, it is contended that, under Or. XLI, r. 4, C. P. C., we can make a decree in this respect that will enure to the benefit of all the Defendants.

The decree in this case is a decree for partition, and proceeds upon a ground common to all the parties, namely, the convenience and inconvenience of each. The

(1) 12 W. R. 160 (1869).
(2) I. L. R. 34 Cal 878 (1907).

appeal also is directed against the whole decree. It is true that the portion of the decree which deals with the question of the incidence of the costs is severed so as to make each party of Defendants liable for the costs allocated against it; but that does not prevent the application of Or. XLI, r. 4, C. P. C. It has been held in the case of *Ram Kamal Shaha* v. *Ahmad Ali* (3), that it is not necessary for the application of sec. 544 (now Or. XLI, r. 4), C. P. C., that the decree should proceed on every ground common to all the Plaintiffs or Defendants; and it is quite sufficient if it proceeds on any ground common to the party to which the Appellant belongs. We think, therefore, that there is no bar to the application of Or. XLI, r. 4, C. P. C., and that being so, it is not necessary to invoke the aid of Or. XLI, r. 33, which is couched in very wide terms and gives the Courts of appeal very wide powers for the purpose of doing justice between the parties.

It has been further argued that the judgment does not order the apportionment of the costs of the suit, that the decree is not in accordance with the judgment so far as these costs are concerned and that the decree is, therefore, amenable to amendment. This amendment might of course have been made by the first Court, but that would result in a joint decree for the costs of the suit against all the Defendants. Such a decree would offend against the principles of the cases of *Shyama Soondari* v. *Jardine Skinner* (1) and *Dildar Ali* v. *Bhawani Singh* (2). Under sec. 107, C. P. C., we have the same power as the Court of first instance; and, in making the final determination in the case, we must pass a decree that is in conformity with law.

(1) 12 W. R. 160 (1869).
(2) I. L. R. 34 Cal. 878 (1907).
(3) I. L. R. 30 Cal. 429 (1903).

In this view of the question raised, we think that the order of the Court below as to the costs incurred before the preliminary decree should be set aside and each party directed to bear its own costs up to that point. The costs of the partition will be apportioned according to the shares of the parties. The success of the Appellant being only partial, each party will bear its own costs in this appeal.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 518 OF 1909.

CARNDUFF, J.
RICHARDSON, J.
1914,
15, January.

SREEMUTTY AYATANNESSA BIBI, Plaintiff, Appellant,
v.
KULFU KHALIFA and ors., Defendants, Respondents.

Civil Procedure Code (Act V o 1908), sec. 92—Suit by mutwalli to remove trespasser managing trust as trustee de facto—Leave, i necessary

Sec. 92 of the Civil Procedure Code does not apply where a Plaintiff claiming to be the trustee of a public religious and charitable trust sues for the removal of a trespasser who has usurped the management of it.

BUDREE DAS MUKIM *v.* CHOONI LAL JOHURRY (3) *followed.*

NETI RAMA JOGIAH *v.* VENKATA CHARULU (1) AND SAJEDUR RAJA CHOWDHURI *v.* GOUR MOHUN DAS BAISHNAV (2) *not followed.*

This was an appeal from a decision of Rai Kissori Lal Sen, Bahadur, Subordinate Judge of Dacca, dated the 25th of August 1909.

(1) I. L. R. 26 Mad. 451 (1902).
(2) I. L. R. 24 Cal. 418 (1897).
(3) 10 C. W. N. 581: s. c. I. L. R. 33 Cal. 789 (1906).

SREEMUTTY AYATANNESSA BIBI *v.* KULFU KHALIFA.

The suit out of which this appeal arose was in respect of a *waqf* estate valued at Rs. 10,000.

Plaintiff's case substantially was that one Fekun Bibi, by *towliatnama*, dated 6th Aswin 1286, had appointed a minor, Abdul Miah, and one Makbul Dewan mutwallis. Abdul Miah died in his minority; that one of the terms of Fekun Bibi's deed was "if both the mutwallis died, without appointing a mutwalli, then amongst their sons and sons' sons and heirs, whoever would be pious and of good qualities, would be the mutwalli of the said property and shall act in terms of the *towliatnama*"; that Makbul Dewan died in Agrahayan 1301 without appointing any mutwalli leaving him surviving his wife, the Plaintiff, and his sons Abdul Hamid Dewan (Defendant No. 2), Abdul Guffoor Dewan and Abdul Habib Dewan, and a daughter Sahera Khatun. Abdul Hamid, it was alleged, was illiterate, ignorant and devoid of all sense of right and wrong, and the others were minors, and that in consequence the mutwalliship had vested in the Plaintiff, and she had been acting as such since; that Abdul Hamid declaring himself to be mutwalli, by a deed, dated 19th Baisakh 1307, appointed one Fajli Rahoman (wicked man) as mutwalli and Defendant No. 1, Kulfu, and one Nadir Buksh as naib-mutwallis. Fajli Rahoman got his name registered as mutwalli under the Land Registration Act, but as he died on the 16th Kartik 1315, Defendant No. 1 applied for registration of his name as naib-mutwalli. Defendant No. 3 was the wife and Defendant No. 4 was the daughter of Fajli Rahoman.

In these circumstances, Plaintiff brought this suit for declaration of her title as mutwalli and recovery of possession of the *waqf* estate. By a subsequent petition, Plaintiff admitted that she had been dispossessed of the *waqf* estate and asked for amendment of the plaint accordingly. All the Defendants appeared. They put in written statements raising issues on the merits and issues of law.

Without calling upon the parties to adduce any evidence, the Subordinate Judge heard them on the issues of law, amongst which issue No. 4 was—"whether this suit is cognizable by this Court, and without the sanction of the Advocate-General?"

Upon this issue, the Subordinate Judge held as follows:—

"It is necessary to determine the character of the endowment. According to the *towliatnama* of 1286, the trust is one partly for charitable and partly for religious purposes. So far as it was 'for the feeding of way-farers and travellers (rahi mosafaran)', it was a trust for a public charitable purpose, and so far as it was for the lighting of the mosque and for the performance of the rites of Bakr-id Korbani and other rites', it was a trust for religious purposes.

"Next question for decision is, what are the scope and object of this suit? It is contended by the learned pleader for the Defendants, that it is a suit for the removal of a trustee and also one for the administration of the trust. On the other hand, Plaintiff contends that the Defendant is not a trustee according to the *towliatnama*. According to the Plaintiff, Defendant No. 1 is a *de facto* trustee though not a trustee *de jure*. Then Plaintiff seeks for her own appointment and for possession of the trust property.

"In these circumstances, I am of opinion that the present case comes within the proviso of sec. 92 of Act 5 of 1908. It is a suit in respect of a public and religious trust, it is a suit for the removal of a *de facto*

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trustee, it is a suit covered by the words 'when the direction of the Court is deemed necessary for the administration of the trust'. See *Neti Rama Jogiah* v. *Venkata Charulu* (1), and *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (2).

"This suit is not brought under Act 20 of 1863 after sanction obtained under sec. 18 of that Act. Nor is it one brought under the provisions of sub-sec. 1 of sec. 92 of the Code of Civil Procedure.

"Therefore, the suit must be dismissed and it is dismissed. Plaintiff to pay the costs of the Defendants, with one set of pleader's fees, to be calculated at half the rate of contested fees."

The Plaintiff appealed to the High Court.

Babus Basanta Kumar Bose and *Prokash Chunder Sircar* for the Appellant.

Mr. S. P. Bose, *Babu Ramani Mohan Chatterjee* and *Moulvi Wahed Hossain* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CARNDUFF, J.—This is an appeal preferred by the Plaintiff against the dismissal of her suit on the preliminary ground that it was not maintainable without the consent of the Advocate-General, as required by sec. 92 of the Code of Civil Procedure.

The Plaintiff claims to be the rightful mutwalli of a religious and charitable endowment by virtue of a *towliatnama* executed by the founder, her deceased husband. The Defendants, she declares, have no right whatever to interfere with the management of the trust, and are, in fact, trespassers, who have wrongfully intervened, had their names registered under the Land Registration Act, 1876, in respect of the trust property and usurped the management of it. She now seeks to obtain the possession to which she claims to be entitled under the deed of endowment. She complains of no breach of trust, and she does not ask for any direction as to the administration of the trust.

The Subordinate Judge in the Court below has argued that the Defendant now in possession is trustee *de facto*, if not *de jure*; that the suit is for his removal; and that it is one in which the direction of the Court may be necessary for the administration of the trust. He has held, therefore, relying upon the decisions in *Neti Rama Jogiah* v. *Venkata Charulu* (1), and *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (2), that sec. 92 of the Code applies, and that the suit must be dismissed.

Assuming, as we must do for the purposes of this appeal, that the Defendants are what the Plaintiff represents them to be, I think that a suit such as this for the removal of a trespasser in possession of trust-property is not a suit of the kind contemplated by the section. Nor, in my opinion, does it help the trespasser to call him a trustee *de facto*. A dacoit might be that, and the provision was surely never intended to protect him from being sued too readily.

The first ruling cited by the learned Subordinate Judge has been distinguished by the Court in *Budree Das Mukim* v. *Chooni Lal Johurry* (3), while the second has been dissented from in the same case and also in the earlier case of *Budh Singh Dudhuria* v. *Niradbaran Roy* (4). These decisions were, no doubt, under sec. 539 of the Code of 1882, and it is true that

(1) I. L. R. 26 Mad 451 (1902).
(2) I. L. R. 24 Cal. 418 (1897).
(3) 10 C. W. N. 581 : s. c. I. L. R. 33 Cal. 789 (1906)
(4) 2 C. L. J. 43 at p. 439 (1905).

cl. (a) of sec. 92, sub-sec. (1), of the new Code regarding a suit to obtain a decree "for removing any trustee," and sub-sec. (2) are new. But these additions do not, so far as I can see, alter the law on the point; and I find that in a very recent case, namely, *Muhammad Abdul Majid Khan* v. *Ahmed Said Khan* (5), which was decided under the present Code, the Allahabad High Court has followed *Budree Das Mukim* v. *Chooni Lal Johurry* (3).

I think, therefore, that this appeal must be allowed, the decree of the learned Subordinate Judge discharged, and the suit remanded to the Court below for disposal on the merits.

The costs of the appeal I would make costs in the cause, and I would declare that the Appellant is entitled to a certificate under sec. 13 of the Court Fees Act, 1870.

RICHARDSON, J.—I agree. The case seems to me to be governed by the observations made in *Budree* v. *Chooni* (3).

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1522 OF 1910.

N. R. CHATTERJEA, J. WALMSLEY, J. 1913, Heard, 26 and 27, June. Judgment, 4, July.

BITARI RAM, Plaintiff, Appellant, *v.* KANJI SINGH & ors., Defendants, Respondents.

The Indian Limitation Act (IX of 1908), secs. 20, 57, Art. 57, Sch. I—The Indian Contract Act (XI of 1872), secs. 60, 61—Suit for money payable for money lent—Payment of interest saving limitation—Creditor's discretion to apply money received to oldest debt—Second appeal—Tender of evidence* (bahi khata) *at hearing.

The Plaintiff brought a suit on the 28th May 1909 for money due on an adjustment of accounts. The Plaintiff alleged that the last adjustment took place within three years from the date of the institution of the suit when the Defendant promised to pay. The Courts below dismissed the suit. The District Judge in appeal however found that the Defendant took a loan of Rs. 50 from the Plaintiff on 21st June 1906, but he refused to give a decree for that amount, because the Defendant paid Rs. 52 in 1907, although he believed the Plaintiff's books and evidence to be genuine, and there was at the time of payment over Rs. 700 due from the Defendant. In the High Court at the time of the hearing of the appeal the Plaintiff produced an entry in his bahi khata *showing that Rs. 43 was paid by the Defendant on account of interest in 1907.*

Held—*That a creditor cannot claim the benefit of sec. 20 of the Limitation Act unless he can show that the payment was made on account of interest as such: there must be either some express declaration by the debtor or there must be circumstances from which such an intention on the part of the debtor may be inferred and in the absence of either, the payment of Rs. 52 did not operate to save limitation under sec. 20.*

That under secs. 60 and 61 of the Contract Act the creditor may exercise his discretion and apply any money paid to him by the debtor in discharge of the oldest debt and the lower Appellate Court was in error in treating the Rs. 52 as a repayment of the recent loan of Rs. 50.

That the High Court could not receive the entry in the Plaintiff's bahi khata *relating to the payment of Rs. 43 at this stage and could not pay any attention to it, inasmuch as it was not put in evidence before either of the lower Courts.*

This was an appeal preferred on the

(3) 10 C. W. N. 58 s. c. I. L. R. 33 Cal. 789 (1906).

(5) I. L. R. 35 All. 459 (1913)

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2nd May 1910 against the decree of M. Smither, Esq., District Judge of Zilla Shahabad, dated the 29th of January 1910, affirming the decree of Babu Surendra Nath Ghosh, Munsif at Arrah, dated the 13th August 1909.

The Plaintiff brought a suit on 28th May 1909 for money due upon an adjustment of accounts in *bahi khata*. The Plaintiff's case was as follows :—Hanuman Sing was the father of the Defendant No. 1; the husbands of the Defendants Nos. 2 to 4 were also the sons of the said Hanuman Sing. The father and the sons formed members of a joint Hindu family. The father had money dealings with the Plaintiff. After his death his son (the Defendant No. 1) continued to have money dealings with the Plaintiff and on June 21st, 1906 (Asar 1313), he took a loan of Rs. 50. The last adjustment of accounts between the Plaintiff and the Defendant No. 1 took place in Jait 1315, and it was found that Rs. 961 as. 8 was due to the Plaintiff and the Defendant No. 1 promised to pay.

The defence was that the suit was barred by limitation, that nothing was due to the Plaintiff from Hanuman Sing deceased on *bahi khata*, that the Defendant No. 1 never had any money dealings with the Plaintiff and no accounts were ever adjusted between them. Both the Courts below dismissed the Plaintiff's suit. The lower Appellate Court found : —" It is quite clear that for many years the Plaintiff used to lend money to Defendant's father . . The Plaintiff's books and evidence of actual transactions are good . . Taking this view I accept the evidence of the advance of Rs. 50 in Asar 1313. But I am not satisfied that the Defendant made any contract binding himself to pay the previous debts incurred in his father's time, and these are barred by limitation in the absence of such a contract . . . The question is whether the Defendant made a promise to pay such that the Plaintiff understood that it was a binding undertaking intended by the Defendant to be acted upon and also whether there was any consideration for it as a contract. On the evidence and a consideration of the circumstances, I think the Plaintiff fails on these points. As the Defendant made payment of Rs. 52 in 1314, there will be no decree in respect of the Rs. 50 lent in 1313."

The Plaintiff preferred a second appeal to the High Court.

Babus Provash Ch. Mitter and *Susil Madhab Mullik* for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Ramesh Ch. Sen* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This appeal arises out of a suit for money due on an adjustment of accounts.

The Plaintiff alleged that the predecessor of the Defendants had money transactions with him and that there was a settlement in Jait 1312; then Defendants' predecessor died and the transaction continued, and the last adjustment was made on Jait 30th, 1315, when Rs. 965-8-0 was found due to the Plaintiff, and a promise was made by the Defendants to pay the money.

The Defendants denied the alleged transactions, the adjustment of accounts, and the promise to pay, and they also pleaded limitation.

The Court of first instance held that the suit would not be barred by limitation if there really was an adjustment on Jait 30th, 1315, but he found that there was no such adjustment.

The learned District Judge, on appeal, held that the Defendants did not on Jait

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30th, 1315, promise to pay the amount due and that in consequence the suit was barred by limitation.

The case is clearly governed by Art. 57 of the Limitation Act, and on the findings the suit is barred unless Plaintiffs can get the benefit of sec. 20 of the Act.

The suit was instituted on May 28th, 1909.

It is urged before us that there were payments made by Defendants in 1907, of a nature to save limitation, and a page in Plaintiff's *bahi khata* is shown to us to prove the allegation, and we are asked to hold that the lower Courts have erred in not taking this document into consideration. The page in question is in the same book in which Ex. 2 is to be found, and it relates to the year 1313. We do not think, however, that we can pay any attention to this page; for, after examining the record, we find that it was not put in evidence before either of the lower Courts. We come to this conclusion for the following reasons: the page has not been marked as an exhibit, while the account for 1314 was marked: no copy was left with the record when the book was taken back; no reference was made in the examination of Plaintiff's witnesses or the cross-examination of Defendants' witnesses to the very important entry of a payment of Rs. 43 as interest in 1907: no allusion to the page is made either by the Munsif or by the District Judge, and in appeal to this Court the only reference to it in the grounds of appeal is in some supplementary grounds filed at the time of hearing. As the page in question is the only evidence of the alleged payment of Rs. 43 in 1907 on account of interest, and as we hold that we cannot receive it at this stage, it follows that the payment of Rs. 43 on account of interest is not proved.

There remains one further question. The learned Judge found that Defendants took a loan of Rs. 50 on June 21st, 1906, but he refused to give the Plaintiff a decree for that amount, because Defendants paid Rs. 52 in 1907, although he believed the Plaintiff's books and evidence to be genuine, and there must at the time have been over Rs. 700 due from the Defendants. It is urged that the Judge is wrong in appropriating the Rs. 52 to the repayment of the loan of Rs. 50 and that it ought to be regarded as a payment of "interest as such" within the meaning of sec. 20.

We have no hesitation in holding that the learned Judge was in error in treating the Rs. 52 as a repayment of the recent loan of Rs. 50; for, under secs. 60 and 61 of the Contract Act, the creditor might exercise his discretion to apply the money in discharge of the oldest debt.

In regard to the question whether it was a payment of "interest as such", we have been referred to the cases of *Subraya* v. *Pakaya* (1) by reasoning, which would apply equally well to *Rai Mohan Saha's* case, payments were made expressly on account of principal and interest. On the other hand, there is the case of *Damodar Ram Chandra Bapat* v. *Bai Jankibai* (3), where payments were made without any specification of their object; there Tyabji, J., distinguishing the case of *Subraya* v. *Pakaya* (1) by reasoning, which would apply equally well to *Rai Mohan Saha's* case, held that it was incumbent on the Plaintiff to establish clearly in some way that the payment was on account of interest as such. In doing so, he followed the case of *Hanmant Mal Motichand* v. *Rambai* (4): in that case there was a large balance due from Defendant by way of principal and

(1) 4 Bom. L. R. 231 (1902).
(2) Civil Rule N. 3930 of 1909, decided on the 18th February 1910.
(3) 5 Bom. L. R. 850 (1903).
(4) I. L. R. 9 Bom. 198 (1879).

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interest; and Defendant made numerous payments, but without any intimation that any payment was to be appropriated to interest. It was held that there was no payment of interest as such. To these may be added the cases of *Surju Prasad* v. *Khawhish Ali* (5), *Narronji* v. *Magniram Chandaji* (6), *Santeswar Mahata* v. *Lakhi Kanta Mohanta* (7), and *Moheshur Panda* v. *Baidya Nath Jana* (8), all of which lay down that a creditor cannot claim the benefit of sec. 20 unless he can show that the payment was made on account of interest as such: there must be either some express declaration by the debtor or there must be circumstances from which such an intention on the part of the debtor may be inferred.

In view of these authorities we think that the payment of Rs. 52 did not operate to save limitation under sec. 20 of the Act; for there was no declaration by the debtor of his desire that the money should be received on account of "interest as such", and the circumstances do not lead to such an inference.

On these findings, the Plaintiff's appeal fails except in regard to the loan of Rs. 50; for that he will get a decree with interest at 1 per cent. per mensem from June 21st, 1906, to May 28th, 1909, and at 6 per cent. per annum from that date to the date of decree, and with proportionate costs in all Courts.

Appeal dismissed.

(5) I. L. R. 4 All. 512 (1882).
(6) I. L. R. 6 Bom. 103 (1880).
(7) I. L. R. 35 Cal. 813, 817 (1908).
(8) Unreported: special appeal No. 2757 of 1908.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE No. 3453 OF 1910.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 9, 10 and 11, April.
1914,
Judgment, 13, May.

SAILAJA PROSAD CHATTERJEE and others, Defendants, Appellants.
v.
JADU NATH BOSE, Plaintiff, Respondent.

Probate or letters of administration, revocation o—Effect on alienation under revoked grant—Void or voidable grant—Mortgage to pay off debt due by estate, if subsists after revocation—Probate and Administration Act (V of 1881), sec. 90—Sanction of Court obtained in respect of principal, but not of interest—Stipulation as to interest if binding— **Post diem** ***interest.***

A purchaser of property sold under a grant of probate or letters of administration, subsequently revoked, in order to discharge a debt which the true executor or administrator was compellable to pay acquires an indefeasible title.

There has been a divergence of judicial opinion on the question of the effect of revocation of a probate or letters of administration, the effect being made to depend upon whether the grant was void or voidable. A view more favourable to the rights of a bonâ fide *transferee for value without notice has been taken in recent decisions where grants have been treated as operative until revoked even when obtained by fraud and by suppression of the fact that the deceased had left a Will.*

DEBENDRA NATH DUTT *v.* ADMINISTRATOR-GENERAL OF BENGAL (12), *referred to.*

Where a co-proprietor of the executor having satisfied the entire Government revenue obtained a decree for contribution

(12) L. R. 35 I. A. 109: s. c. I. L. R. 35 Cal. 955; 12 C. W. N. 802 (1908).

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against him, and in execution thereof a property belonging to the estate was sold at an inadequate price, and meanwhile the probate having been revoked, administrators appointed in his place with the Court's sanction mortgaged the property to procure money which they applied in setting aside the sale under sec. 310A of the Civil Procedure Code of 1882, and subsequently on appeal by the executor, the latter was restored to office and the letters of administration were cancelled :

Held—*That the mortgage held good.*

Sec. 90 of the Probate and Administration Act which authorises an administrator to grant a mortgage of immoveable property vested in him only with the previous permission of the Probate Court implies that sanction of the Court should be taken of all the essential elements of the mortgage transaction including the provision for payment of interest.

Where the principal amount only was mentioned in the application for sanction, but in the mortgage actually executed the administrators stipulated to pay compound interest at 30 per cent. per annum with half-yearly rests, the Court reduced it to simple interest at 9 per cent. per annum, and it was directed that the interest should be added to the mortgage money as was done in CHAJMAL *v.* BRIJ BHUKAN (31).

This was an appeal from a decision of Mr. Jogindra Nath Mookerjee, District Judge, Bankura, dated 30th July 1910, confirming that of Babu Ram Narain Sarkar, Subordinate Judge of Bankura, dated 25th May 1909.

Babus Bepin Behary Ghose, Khetra Mohun Sen and *Bankim Chandra Mukherjee* for the Appellants.

Babu Manmotha Nath Roy for the Respondent.

(31) L. R. 22 I. A. 199 : s. c. I. L. R. 17 All. 511 (1895).

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by some of the Defendants in a suit to enforce a mortgage security. The substantial question in controversy between the parties is, whether the mortgage is operative upon the property now in the hands of the Appellants. The circumstances under which the mortgage was created are not in dispute at this stage and may be briefly stated. The property formed part of the estate of one Durgadas Chatterjee who made a testamentary disposition on the 6th April 1885. The testator died in 1890, and on the 8th December of that year probate was granted to his eldest son Annoda Prosad Chatterjee who was named as the executor in the Will and figures as the first Defendant in this litigation. On the 20th February 1894 the widow of the testator and one of his grandsons who are the second and third Defendants respectively in this suit, applied to the Probate Court for removal of the executor on the ground of his misconduct and for revocation of the probate issued to him. On the 19th July 1894, the probate was revoked and the appointment of the first Defendant as executor was cancelled. On the 17th August 1894, the Probate Court appointed the widow and the grandson as joint administrators, and four days later issued to them letters of administration (inaccurately described in the order-sheet as " probate ") with copy of the Will annexed. On the 10th September 1894, the executor whose appointment had been revoked, lodged an appeal in this Court against the order of the District Judge. On the 31st July 1896, the appeal was allowed, and the order of the District Judge reversed on the ground that the alleged misconduct and mismanagement did not constitute a just cause for removal of an

executor under cl. 1 of sec. 50 of the Probate and Administration Act [*Annoda Prosad* v. *Kali Krishna* (1)]. Thereupon, the probate originally issued to him which had been recalled and cancelled, was re-issued to him by the District Judge on the 19th February 1897, pursuant to an order made in that behalf on the 11th February 1897. Meanwhile on the 26th April 1895, in execution of a decree for money against the executor, the disputed property was sold and was purchased by Pitambar Chatterjee, now represented by the Appellants. The decree had been obtained by a co-proprietor of the estate in a suit for contribution in respect of revenue payable to Government by all the proprietors. The administrators, who were in possession of the estate at the time of the sale, applied to the District Judge on the 4th May 1895 for permission to raise money by mortgage of part of the estate, with a view to have the sale set aside under sec. 310A of the Civil Procedure Code of 1882. They represented—and the accuracy of their statement has not been called in question—that the property was worth more than Rs. 1,000, and that if the sale, which had taken place for Rs. 195 only, was allowed to stand, serious loss would result to the estate. The District Judge sanctioned the mortgage, and directed that the very property, which would thus be saved, be given by way of security. The Plaintiff thereupon advanced Rs. 550 to the administrators who applied the money for cancellation of the sale, and on the 21st May 1895 executed in his favour the mortgage now sought to be enforced, by which they undertook to repay the loan on the 12th April 1896. On the 21st April 1898, *i.e.*, after the executor had been restored to his office as the result of the appeal to this Court, the disputed property was sold in execution of a money decree against him as executor of the estate and was purchased by the decree-holders, who subsequently transferred the same to Pitambar Chatterjee, predecessor of the present Appellants, on the 29th December 1898. On the 9th April 1908, the Plaintiff commenced this litigation to enforce his security, and he joined as Defendants eleven persons, namely, the executor as the first Defendant, the administrators as the second and third Defendants, and the representatives of the purchaser as the remaining Defendants. The claim was contested by the last named Defendants only, on the ground that the mortgage was inoperative, because granted by administrators erroneously appointed as such. The Courts below have concurrently overruled this defence, and have decreed the suit. On the present appeal, the decree of the District Judge has been challenged on two grounds, namely, *first*, that the mortgage granted by the administrators does not bind the estate, and, *secondly*, that as the provision for payment of compound interest at a high rate was not sanctioned by the District Judge, the claim for interest cannot be sustained.

The first point taken on behalf of the Appellants raises the question of the effect of revocation of a probate or letters of administration, upon which there has been some divergence of judicial opinion. The effect of revocation of a grant of probate or letters of administration has been made to depend mainly upon whether the grant was void *ab initio* or merely voidable. In *Abram* v. *Cunningham* (2), it was decided that where administration is granted on concealment of a Will which appointed

(1) I. L. R. 24 Cal 95 (1896).

(2) (1677) 2 Lev 182.

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executors, the grant is void from its commencement, and all acts performed by the administrator in that character are equally void and cannot be made good, even though the executor should afterwards appear and renounce. But in *Peckham's* case (3) it was held that if the administrator had paid funeral expenses, debts, or legacies, which the law forced the executor to pay, the administrator, in an action against him by the executor, should recoup so much in damages, because he was compelled to pay it, and the true executor had no prejudice by it, for as much as he himself would have been bound to pay it. Again, from *Gruysbrook* v. *Fox* (4), it appears that in an action by the true executor against the purchaser of goods sold to him by the administrator, the sale is indefeasible, if made to discharge the funeral expenses or debts which the administrator or executor was compellable to pay. Where, however, the act in question is one which the administrator was not compellable to do, but is a voluntary act on his part, it has been sometimes said that it is simply void, and no title is thereby conferred on a purchaser [*Hewson* v. *Shelly* (5)] or mortgagee [*Ellis* v. *Ellis* (6)] from him, and the vendor is also liable in damages in an action by the true executor [*Woolley* v. *Clark* (7)]. In *Boxall* v. *Boxall* (8), it was held that where the Will does not appoint an executor, the repealed grant obtained by suppressing the Will, is not void *ab initio*, and, therefore, a sale under it was held to be a valid transaction. But wherever the grant of administration is voidable only, as where it has been granted to a party not next of kin, or, where the executor having acted and the Court not knowing it committed administration to another or without citing the necessary parties, all lawful acts done by the first administrator are deemed valid as against the subsequent administrator [*Packman's* case (9), *Blackborrough* v. *Davis* (10)].

It is worthy of note that the earlier cases to which we have referred were criticised by Lord Redesdale in *Doyle* v. *Blake* (11), and a view more favourable to the rights of the *bonâ fide* transferee for value without notice has been taken in modern decisions, to which we shall now refer. Thus in *Debendra Nath* v. *Administrator-General* (12), where the Judicial Committee affirmed the decision of the majority in *Debendra Nath* v. *Administrator-General* (13), Lord Macnaghten observed that so long as the letters of administration remained unrevoked, the person in whose favour the grant had been made was to all intents and purposes administrator, and his receipts were valid discharges for all moneys received by him as administrator. The full significance of this observation is appreciated when it is borne in mind that the letters of administration had been obtained by fraud and by suppression of the fact that the deceased had left a Will. A similar view had been previously indicated by Woodroffe, J., in *Gopal Dass* v. *Budreedas* (14) which may be difficult to reconcile with the *obiter dictum* in *Prayrag* v. *Goukaran* (15), and was subsequently adopted by

(3) (1488) Plowden 282.
(4) (1562) 1 Plowden 275
(5) (1913) W. N. 246.
(6) [1905] 1 Ch. 613.
(7) 5 B. & Ald. 744, 24 R. R. 546 (1822).
(8) 27 Ch. D. 220 (1884).
(9) (1595) 6 Coke, 18 B.
(10) (1702) 1 P. Wms. 40 (43).
(11) (1804) 2 Sch. & Lef 231 (237).
(12) L. R. 35 I. A. 109: s. c. I. L. R. 35 Cal. 955; 12 C. W. N. 802 (1908).
(13) I. L. R. 33 Cal 713: s. c. 10 C. W. N. 678 (1906).
(14) I. L. R. 33 Cal. 657 (1906).
(15) 6 C. W. N. 787 (1902).

Neville, J., in *Craster* v. *Thomas* (16). It will be observed that in the case last mentioned, the administration had been granted notwithstanding the existence of Will which had been kept back from the Court, and it was thus precisely a case in which it might be argued with plausibility that the grant was void *ab initio;* yet the Court held that the grant was voidable and not void. Consequently, if the view is maintained that a grant of administration made by a competent Court, though erroneously is voidable, that is operative till it has been revoked by that Court or set aside by a superior tribunal, there is no room for controversy that the mortgage in suit is binding upon the estate. But even if we take a more restricted view, namely, that adopted by Walsh, J , in *Graysbrook* v *Fox* (4), the mortgage is clearly indefeasible, because it was created to satisfy a debt of the estate which the executor himself was compellable to pay. The executor had failed to pay the Government revenue due, which had thereupon been satisfied by one of the joint proprietors of the estate. The executor thereafter did not re-imburse the co-proprietor who was consequently constrained to sue and to obtain a decree Even then the executor did not satisfy the judgment debt, execution followed with the result that a valuable property was sold for an inadequate price. Under these circumstances, the administrators, with the sanction of the District Judge, raised a loan and saved the property which it was their paramount duty to do. They did nothing beyond what it would have been obviously incumbent upon the executor to do for the protection of the estate, if he had been in possession at the time, and we are unable to discover any conceivable principle of justice, equity and good conscience to support the contention that the mortgage was *ab initio* void, because granted by administrators erroneously appointed by the Probate Court. It may be added that the more liberal view indicated above has been adopted in the American Courts, where it has been ruled that all acts done by an executor or an administrator in the due and legal course of administration are valid and binding, even though the letters issued by the Court are afterwards revoked or the incumbent discharged from his trust. [*Bigelow* v. *Bigelow* (17), *Foster* v. *Brown* (18), *Fisher* v. *Bassett* (19).] But reference has been made to a *dictum* in *Boxall* v. *Boxall* (8), that if a grant is reversed by a Court of Appeal, it must be deemed void *ab initio*, though revocation takes effect only from the time of the recall, and it has been argued that all intermediate acts of the executor or administrator pending an appeal which results in a reversal of the former sentence are void, because it is said on the strength of a *dictum* in *Price* v. *Parker* (20), the appeal suspends the former sentence, which on its reversal places all the parties in the position which they would have occupied if it had never existed. This contention does not appear to be well-founded on principles, and cannot, at any rate, be applied to the Indian system of law which explicitly recognises the doctrine that an appeal does not operate as a stay of proceedings under the decree or order challenged by way of appeal (Or. 41, r. 5, of the Civil Procedure Code, 1908). It is worthy of remark that in the Courts of United States, although

(4) 1 Plowden 275.
(16) [1909] 2 Ch. 343.
(8) 27 Ch D. 220 (224) (1884).
(17) 19 Am. Dec. 591.
(18) 19 Am. Dec. 652.
(19) 38 Am. Dec. 227.
(20) (1641) 1 Lev. 157.

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in some cases [*State* v. *William* (21), *Muirhead* v. *Muirhead* (22)] the view has been maintained that an appeal suspends the operation of a decree and leaves the executor or administrator in office as before, there is respectable authority for the contrary opinion that an appeal by an executor from an order revoking probate of the Will does not continue the powers of the executor pending the appeal [*Harney* v. *Scott* (23), *Crozier's Estate* (24), *In re Marsh* (25)]. But the Appellants are in a further difficulty in the present case. The executor was actually removed and the administrators were placed in possession long before the appeal was preferred. Consequently, there is no room for the application of the doctrine that the appeal suspended the operation of the order for revocation. We may add that in systems where the view is maintained that an appeal against an order of revocation suspends the operation of the order, practical difficulty in the management of the estate is avoided by the appointment of an administrator *pendente lite*, and plainly no question could arise as to the legality of the mortgage in suit, if the administrators here are deemed to have been, in essence at least, administrators *pendente lite*. We need not, however, have recourse to what might be called a fiction and, for the reasons previously assigned, we hold that the mortgage granted by the administrators with the sanction of the Probate Court bound the estate.

The second point taken on behalf of the Appellants raises the question of the validity of the claim for interest. In the application to the District Judge for sanction of the proposed mortgage, the principal amount required to be raised was stated as Rs. 550, but no mention was made about interest. When the deed was executed by the administrators, they covenanted, however, to pay compound interest at 30 per cent. per annum with half-yearly rests. Under sec. 90 of the Probate and Administration Act, an administrator is authorised to grant a mortgage of the immoveable property vested in him, only with the previous permission of the Probate Court. This implies a sanction by the Court of all the essential elements of the mortgage transaction, and there is no room for doubt, that from the point of view of the burden imposed on the estate, the provision for payment of interest may be even more effective than the principal amount of the loan required to be raised [see *Ganga Prosad* v. *Maharani Bibi* (26), *Thakur Prosad* v. *Gountpat Rai* (27), which arose on the corresponding provisions of the Guardians and Wards Act, XL of 1858, sec 18 and VIII of 1890, sec. 29, see also *Abhiram Pal* v. *Makunda Lal Dutta* (28), *Roy Radha Kissen* v. *Nauratan Lal* (29), *Nimai Chand Addya* v. *Mir Golam Hussain* (30)]. In the case before us, the clause for the payment of compound interest at a high rate was manifestly unreasonable, and the lender obviously made the best of the embarrassing situation in which the administrators found themselves. We accordingly reduce the interest to simple interest at 9 per cent per annum, and we do so partly in view of the fact that the mortgagee has

(21) 9 Gill. 172.
(22) 8 Sm and M. 211
(23) 28 Mo. 335.
(24) 65 Cal. 332, 4 Pac. 109.
(25) (1903) 55 All. 299.

(26) L R. 12 I A 47 : s. c. I. L. R. 11 Cal. 379 P C (1884).
(27) I. L. R 30 All. 188 (1908).
(28) 5 C. L. J. 542 (548) (1906)
(29) 6 C. L. J. 490 (521) (1907).
(30) I. L. R. 37 Cal. 179 : s. c. 11 C. L J. 317 ; 14 C. W. N. 535 (543) (1909).

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waited till very nearly the last day of the period of limitation, clearly with the object that the claim for interest may reach the maximum possible amount. Such interest as we allow is recoverable from the date of the mortgage, and must be added to the mortgage money, as was done by the Judicial Committee in *Chajmal* v. *Brij Bhukan* (31). The decision in *Moti Singh* v. *Ramohari* (32) is clearly distinguishable, as there was no covenant at all for payment of interest *post diem* in that case, and the amount allowed, though added to the mortgage dues, was treated as damages, a distinction not always recognised [*Gordillo* v. *Weguelin* (33)].

The result is that this appeal is allowed in part, the decree of the District Judge discharged, and, in lieu thereof, the usual mortgage decree made in favour of the Plaintiff for Rs. 1,502-14-0, namely, Rs. 550 as principal and Rs. 952-14-0 as interest thereon at 9 per cent. per annum from the 21st May 1895 to the 21st August 1911, which we fix as the date for redemption. The Plaintiff will also be allowed his costs in the Court of first instance on the sum now decreed, such costs to be ascertained in this Court and added to the mortgage dues. If the decretal amount is not paid on or before the 21st August 1911, it will carry interest at 6 per cent. per annum from that date and the mortgage property will be sold in due course for realisation thereof. The Defendants will not be personally liable for any portion of the decretal amount. Each party will pay his own costs of the appeal to the District Judge as also of the appeal to this Court.

We are informed that the mortgaged property has been sold in execution of the decree now set aside, and has been purchased by the decree-holder. The effect of our order will be that the sale will stand annulled from this date, and the property will be re-sold, if occasion arises, in execution of the decree now made [*Seth Umedmal* v. *Srinath Roy* (34), *Chandan Singh* v. *Ramdeni Singh* (35)]. We do not, however, now determine what restitution the decree-holder may be liable to make, if he took possession of the property by virtue of his purchase at the sale now cancelled. That question must be determined by the Execution Court, if an appropriate application is made in that behalf by the party interested. [*Raghu Singh* v. *Sheo Prosad* (36), *Beni Madho Singh* v. *Pran Singh* (37).]

Appeal allowed in part.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 891 OF 1911.

MOOKERJEE, J.
MULLICK, J.
1913,
4, June.

AKHIL CHANDRA BISWAS, Defendant No. 1, Appellant,
v.
HASAN ALI SADAGAR, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885, before amendment by Act I of E. B. & A. C of 1908), sec. 22 (2)—Acquisition of occupancy right by landlord—Holding if ceases to exist—Occupancy holding and occupancy right, distinction between—Under-raiyat's interest, transferability of.

The Plaintiff who was an occupancy raiyat subsequently purchased the superior tenure. Thereafter A, who was an under-raiyat on the holding, transferred his interest in the land to B. The Plaintiff's suit was for ejecting B.

(31) L. R. 22 I. A. 199 s. c. I. L. R. 17 All. 511 (1895).
(32) I. L. R. 24 Cal 699 (1897)
(33) 5 Ch. D. 287 (1877).
(34) I. L. R. 27 Cal. 810 (1900).
(35) I. L. R 31 Cal 499 (1904).
(36) 16 C. L J. 185 (1912).
(37) 15 C. L J. 187 (1911).

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Held—*That the effect of the purchase by the Plaintiff which must be determined with reference to sec. 22 (2) of the Bengal Tenancy Act was to rest the holding in the purchaser subject to the limitation that the occupancy right ceased to exist and not that the holding itself ceased to exist and A continued to be an under-raiyat under the purchaser.*

That a comparison of the phraseology of sub-sec. (2) with that of sub-sec. (1) of sec. 22 shows that in sub-sec. (1) a distinction is made between "occupancy holding" and "occupancy right", and when the occupancy holding ceases to exist, it does not follow that the holding also vanishes.

That the provisions of the Bengal Tenancy Act show that an under-raiyat may, under certain circumstances, acquire an occupancy right. If he does acquire such a right, that right may be transferable by custom or local usage, but there is no authority for the proposition that the interest of an under-raiyat is ipso facto *transferable.*

This was an appeal preferred on the 19th of April 1911, against the decree of Babu Taraek Chandra Das, 2nd Subordinate Judge of Chittagong, dated 4th of January 1911, affirming the decree of Babu Nagendra Kumar Bose, Munsif of South Ranjan, dated the 23rd of November 1909.

The facts will appear from the judgment.

Babu D. L. Kastgir for the Appellant.

Babu Khitish Chandra Sen for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the first Defendant in an action in ejectment. The subject-matter of the litigation is a parcel of land which, according to the Plaintiff, was held by the second Defendant as an under-raiyat. The Plaintiff was originally an occupancy raiyat. In 1886, he purchased the superior tenure. In 1901, the second Defendant transferred his interest in the land to the first Defendant. The present action was commenced in 1909 to eject the first Defendant as a trespasser. The Courts below have concurrently decreed the suit. On the present appeal, that decree has been assailed on three grounds.

It has been contended, in the first place, that the effect of the purchase, by the Plaintiff, of the superior tenure in 1886, was to elevate the status of the second Defendant. This contention is obviously unfounded. The effect of the purchase must be determined with reference to the terms of sec. 22 (2) of the Bengal Tenancy Act as framed in 1885. That sub-section provides that when the immediate landlord of an occupancy holding is a proprietor or a permanent tenure-holder, and the entire interest of the landlord and the raiyat becomes united in the same person by transfer, succession, or otherwise, the occupancy right shall cease to exist; but nothing in the sub-section shall prejudicially affect the rights of any third person. It has not been proved that the superior interest purchased by the Plaintiff was a permanent tenure. But we shall assume for our present purpose that it was a permanent tenure. What then was the effect of the purchase? The result was to vest the holding in the purchaser, subject to the limitation that the occupancy right ceased to exist. But it has been argued for the Appellant that the effect in substance was that the holding itself ceased to exist. This contention is opposed to the decision of this Court in the case, *Jawadul Huq* v. *Ram Das Saha* (1), affirmed in *Ram Mohan*

(1) I. L. R. 24 Cal. 143 (1896).

v. *Kachu* (2). That case turned upon the construction of sub-sec. 2 of sec. 22 of the Bengal Tenancy Act, and is an authority for the proposition that where a proprietor purchases an occupancy holding, the holding does not cease to exist, but merely the occupancy right, which is one of the incidents of the holding, disappears. A comparison of the phraseology of sub-sec. (2), with that of sub-sec. (1), shows that in sub-sec. (1) a distinction is made between "occupancy holding" and "occupancy right", and we are not prepared to accede to the contention of the Appellant that when the occupancy right ceases to exist, the holding also vanishes. In our opinion, the true effect of the purchase by the Plaintiff was to keep the holding in suspense. In this view, the Defendant continued to be an under-raiyat.

It has been contended, in the second place, that the suit is barred by limitation. This argument has clearly no force, because if the Defendant is a trespasser, he is liable to be ejected by the Plaintiff within the period of 12 years prescribed by Art. 142 of the Indian Limitation Act.

It has been contended, in the third place, that the provisions of the Bengal Tenancy Act, in so far as they apply to the ejectment of under-raiyats, have not been followed. This argument involves the obvious fallacy that the first Defendant is an under-raiyat. But the case for the Plaintiff is that the interest of the second Defendant was non-transferable, and that the first Defendant has not acquired any interest in the holding by his purchase. It has been suggested, however, by the Defendant that as there is no provision in the Bengal Tenancy Act, which bars the transfer of the interest of an under-raiyat, that interest must be deemed transferable. We are clearly of opinion that the provisions of the Bengal Tenancy Act do not support this view. They show that the Legislature contemplated that an under-raiyat may, under certain circumstances, acquire an occupancy right. If he does acquire such a right, that right may be transferable by custom or local usage. But there is no authority for the proposition that the interest of an under-raiyat is *ipso facto* transferable.

(2) I. L. R. 32 Cal. 386 1905).

The result is that this appeal is dismissed with costs.

Appeal dismissed.

[CRIMINAL REVISIONAL JURISDICTION.]

Rev. No. 485 of 1912.

Holmwood, J.
Imam, J.
1912,
2, May.

Rakhal Das Sinha and others, Petitioners,
v.
The King-Emperor, Opposite Party.

*Criminal Procedure Code (Act V of 1898), sec. 144—Scope of section—*Hât, *order restraining the holding of—Doing of a lawful act on one's own property if can be restrained under section.*

Where the only ground mentioned for the issue of an order under sec. 144, Cr. P. C., restraining the holding of a rival hât *was that the Magistrate was satisfied from the report of the police that by opening a new* hât *at only half a mile from the old and long established* hât, *the Petitioners were about to disturb the public tranquility:*

Held—*That an injunction cannot be issued not to do a lawful act upon a man's own property, and the order in the form in which it was issued was without jurisdiction.*

That the holding of a hât *on a man's own property is not in itself a wrongful act, and therefore any ulterior consequence which may arise from it cannot give rise to any proceeding against the owner of the land for committing an act likely to cause*

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NOTES

Bar Council Report and junior's fee.

The Report of the General Council of the Bar for 1914 which has just been received contains some very important rulings regarding professional conduct and practice which may be of general interest to members of the English Bar practising in the Chartered High Courts in India. We note that the Conference between the Committee of the Bar Council and that of the Incorporated Law Society have not come to any definite settlement with regard to junior's fee in relation to that of the leader. The Law Society is for adhering to the rule that a junior's fee in all cases should be marked either 2/3rds or 3/5ths of the leader's fee. But the Bar Council is in favour of increasing it in special cases where the leader charges special fees of 100 guineas or upwards. But since no agreement has yet been arrived at between the two sections of the Profession, we take it that the old practice is to prevail.

Practising barrister engaging in business.

The Council has passed some resolutions regarding practising barristers engaging in business which is of importance. The Attorney-General having invited the opinion of the Council as to the propriety of a practising barrister taking an active part in the business of a financial firm at a fixed salary and a commission on the business done by the firm, the Council adopted a resolution, the more material portion of which is as follows:—"The Council are of opinion that a practising barrister should not as a general rule carry on any other profession or business, or be an active partner in, or a salaried official or servant in connection with, any such profession or business." There are, however, exceptions to this general rule. The Council, however, declined to lay down any abstract rules, but observed that whether any particular case is in accordance with or contrary to professional etiquette, depended on the nature and character of each particular case.

But the Council had no hesitation in deciding that "a practising barrister should not actively associate himself with the carrying on of a financial business (*e. g.*, the issuing of Government loans) for a salary or other payment varying with the amount of financial business done. The Council, however, has "no objection to a practising barrister acting as an ordinary director (*i. e.*, not a managing director) of companies of good standing, carrying on a business which is free from anything of a derogatory nature. They consider that there is a great difference between the usual work of ordinary directors in the privacy of a Board Room and the active carrying on or management of a business." "On the other hand the Council see grave objections to a practising barrister taking part in negotiations and arrangements with financial houses and visiting other persons, firms or companies as the representative of any financial house. The Council consider that such conduct on the part of a practising barrister would not accord with the principles which should regulate the conduct of a practising

barrister in relation to his profession as such, and would be clearly contrary to professional etiquette." We presume, the rule is limited only to practising members of the Bar.

Counsel's fee for adjourned hearing in criminal cases.

Is a counsel entitled to any fees if he has accepted brief in a criminal case and after first appearance refuses to appear at an adjourned hearing without a refresher? This is a question which came up before the Bar Council and it has held that he is not entitled to get even the first day's fees if he refuses to appear at the subsequent hearings unless it was expressly arranged with the solicitor instructing him that he was to be paid refreshers in case of adjourned hearings. In the case in question counsel refused to appear at the Central Criminal Court in London after a second adjournment without the payment of a refresher though no refresher was arranged for when the brief was accepted. The solicitor declined to pay a refresher and delivered brief to another counsel who conducted the case till its termination. The solicitor paid the fee marked in the brief to the counsel subsequently engaged and refused to pay any fee to the retiring counsel. On a reference to the Bar Council, the Council held —

"That no refresher having been arranged for, when the brief was accepted, the first named counsel was not entitled to refuse to continue to appear in the case without a refresher; neither was he, having withdrawn from the case, entitled to the fee originally marked."

Barristers in England if may be instructed by Solicitors in India.

A reference was also made to the Council as to whether a barrister practising in England commits any breach of professional etiquette in advising or drawing or settling pleadings on instructions given by post by Indian solicitors, and the Bar Council expressed the opinion that he does not "in advising on contentious questions (either before commencement of or during litigation) within the jurisdiction of the Indian High Court upon instructions sent direct from a solicitor of an Indian High Court without the intervention of a solicitor of the English [illegible]igh Court or in drawing pleadings in cases W[illegible]in the jurisdiction of the Indian High Court, instructions from a solicitor of that High [illegible]ithout the intervention of a solicitor [illegible]'ish High Court."

BELLIGERENT WAR-SHIPS IN NEUTRAL PORTS.

The asylum granted to the German battle-cruisers *Göeben* and *Breslau* and their subsequent purchase by the Ottoman Government before the declaration of hostilities between His Britannic Majesty and Turkey have given rise to some important topics of International Law. These can be conveniently dealt with under the following heads: (1) Asylum of belligerent war-ships in neutral ports, (2) Facilities to belligerent men-of-war during asylum, (3) Duration of stay of belligerent war-vessels in neutral harbour, (4) Purchase of belligerent war-ships by neutrals in their own ports. In this article, an attempt has been made to show the unsatisfactory condition of the law relating to some of these topics and to indicate certain desirable changes therein.

(1) ASYLUM OF BELLIGERENT WAR-SHIPS IN NEUTRAL PORTS.

The rule forbidding the land forces of belligerents to enter neutral territory except on condition of being disarmed and interned does not apply to the entry of war-ships into neutral ports. The customary law permits a neutral to grant temporary asylum to belligerent war-ships in his ports without disarming or detaining them; but a neutral is under no obligation to do so except in cases of distress. Only in the event such a vessel is driven by stress of weather or unseaworthiness to seek shelter can it demand, as a matter of strict law, the right of hospitality and asylum in a neutral port. A neutral may, for reasons of State, close all his ports or any particular port against vessels of war generally. But once a neutral grants asylum to war-vessels of one belligerent, he must in strict conformity to his duty as a neutral give similar permission to men-of-war of the other belligerent. However, as a rule neutral ports are generally open to all belligerent war-ships. But it has, especially since the Russo-Japanese War, been felt that this indiscriminate neutral asylum to naval forces is likely to assist one of the belligerents in a war to the disadvantage of the other, inasmuch as the rules permit neutrals to open their ports as freely to belligerent war-ships escaping from destruction or capture by the enemy as to belligerent war-vessels in distress. The rule makes no distinction between entry to escape the perils of the sea or the enemy or to take on board provisions. The rules permitting neutrals to grant asylum in their ports to belligerent vessels in distress is no doubt founded on the exigen-

cies of life at sea and is quite satisfactory. But since now-a-days a right of pursuit into neutral waters is no longer recognised, to permit a neutral to give shelter to a belligerent war-ship, which is pursued by the enemy, would certainly put the enemy to disadvantage. Besides it might give an opportunity to the fleeing vessel to meet her enemy under conditions favourable to herself, when she comes out (which she must do within 24 hours under the existing law), as it is possible, that she might meet other war-vessels of her State outside the harbour, or she might by a wireless message call to her aid other vessels of her own fleet to meet her near the port and then give battle to the enemy. Thus although the neutral does not actually help either of the belligerents, yet owing to the operations of the defective law one of the belligerents gains an advantage over the other, and thereby under the forms of law the spirit of neutrality is violated.

To prevent such abuses it is desirable to restrict the extension of neutral hospitality to belligerent war-ships seeking asylum in neutral ports to escape, attack, capture or destruction. The law should enjoin neutrals to disarm and detain such belligerent men-of-war as would enter their ports for the purpose of escaping, attack or capture. This procedure would, it seems, considerably shorten the duration of the war by putting the naval forces of one of the parties *hors de combat* sooner than it is possible now. Principles, somewhat of this nature, were advocated by Japan and acted on by the Powers that were neutral during the Russo-Japanese War with excellent results. And it was expected that at the Hague Conference of 1907, States having the fresh experiences of the war of 1905 in view, would lay down rules incorporating the above principles realising thereby to a great extent the strict conception of neutrality. But unfortunately this was not done, only the existing customary law was reiterated in the articles of the Convention.

(2) Facilities to belligerent men-of-war during asylum.

A belligerent man-of-war may not only enter neutral ports without being disarmed, but may also take fuel and supplies and effect small repairs. The rules regarding the supply of coal and the execution of repairs as will be seen are unsatisfactory.

(i) Supply of coal to belligerent war-ships in neutral ports.

The question of supply of coal to belligerent war-vessels came into prominence only in the middle of the last century, when the old wooden sailing-vessels were superseded by the modern steam-ships. Even then the customary law of Nations regarded coal as an innocent article which could be supplied without any objection, although it was necessary that its supply to belligerent war-ships by neutrals should be restricted. Great Britain however took the lead in this direction, and in 1862 in the midst of the Great American War issued regulations restricting the quantity of coal supplied to a belligerent war-ship at her ports to so much as would carry the vessel to the nearest port of her own country; the regulation further provided that such vessel will not receive a fresh supply of coal at either the same or any other British port within three months without special permission. Several Powers, notably the United States of America, adopted them. But the practice of other Powers was much more lax. France, for example, allowed belligerents to take so much coal as would take them to their next port without any limitation to future supplies at her ports. Some States even allowed belligerents to take enough coal to complete their normal supply in times of peace. So when the Russo-Japanese War broke out, there was no uniformity of practice amongst the Nations regarding the supply of coal to belligerents.

During the Russo-Japanese War, Great Britain adopted more stringent rules. By a Proclamation to Governors of Colonies issued in August 1904, she absolutely refused the supply of even the limited quantity of coal (enough to carry the vessel to her nearest home-port) to ships proceeding to the seat of war or to a position or positions on the line of route with the object of intercepting neutral vessels conveying contraband. Sweden, Norway and Denmark resorted to still more drastic measures. By a Declaration of Neutrality issued in May 1904, they closed their ports to the public vessels of both belligerents with the exception of hospital-ships. But the observance of these strict rules by some of the States only failed to have the desired effect. Other States such as France, Holland, Spain, etc., still retained their more lenient practice, and, as a result of this want of unanimity, Russia by making full use of neutral facilities could send a big fleet all the way from her Baltic ports to meet her adversary in the eastern waters, whereas, if the general practice was in accordance with British practice, Russian vessels would possibly never have reached the Mediterranean.

This question came up before the Hague Conference in 1907, and some interested States in order to prevent the repetition of the occurrences of the Russo-Japanese War wanted to lay down stricter rules to be uniformly observed by all the Powers. Great Britain proposed that the quantity of fuel taken on board a belligerent war-ship in neutral jurisdiction should in no case exceed that which was necessary to enable it to reach its nearest home-port. But the rules advocated by Great Britain with coaling stations all over the world, therefore, to a great extent independent of neutral help in war time do not find favour with other Powers less favourably situated. The Japanese and the Spanish proposals were to the same effect. Germany, France and Russia on the other hand contended that belligerents should be allowed to take enough fuel to complete their normal peace supply. The result was that both the proposals were accepted and the present rule therefore embodies both of them as alternatives, thereby practically making the British proposal useless.

Thus the Conference failed to achieve its purpose, and the practice at this moment is just what it was 30 years before and a belligerent will get as much facilities from the majority of States as she did before. Coal is as essential for fighting as ammunition, and a belligerent which obtains full supplies of coal in a neutral harbour gains an enormous advantage thereby. It might, however, be contended that both parties in a war will derive same advantages owing to the lenient rules. But the fundamental idea of neutrality is total abstention from rendering any assistance to either of the belligerents which is certainly not the same thing as helping both equally. Besides, in spite of the perfect desire of the neutrals to help both the belligerents equally, one of them might not require any help, or its wants might not be so pressing as of the other. Consequently, the help given to it will be decidedly less effective. This rule therefore does not conform to the essential principles of neutrality and its existence will tend to lengthen the duration of hostilities and extend the area of operations—the circumstances, which the civilised humanity should try to avoid most.

The most effectual means of remedying these evils, no doubt, would be to prohibit all supplies of coal to belligerent war-ships in neutral ports with the exception of hospital-ships. But it is doubtful, whether many States are yet ripe for so drastic a change. Even if the British and Japanese proposals—which were indeed very logical and moderate—had been accepted, without the alternative, a considerable advance would have been made towards the ideal, and would certainly have had the effect of curtailing the area of naval operations.

(To be concluded in the next issue.)

CURRENT INDIAN CASES.

(CRIMINAL.)

Distribution of criminal work by Honorary Magistrate.

BAL KISHAN *v.* SIPAHI LAL, I. L. R. 36 All. 468.

An order by a District Magistrate directing that the senior Honorary Magistrate should distribute work among the other Honorary Magistrates is an order *ultra vires.*

Indian Penal Code, sec. 447—Criminal trespass.

EMPEROR *v.* RAM SARUP, I. L. R. 36 All. 474.

The accused asked the consent of his co-sharers to build a house on a certain plot of land. This was refused. The accused nevertheless built on the land.

Held—That the mere fact that the complainant objected to the accused's building on the land did not warrant the conclusion that the accused were acting unlawfully and the charge of criminal trespass failed.

Criminal Procedure Code, sec. 195.

MATA PRASAD *v.* BARAM BARHAI, I. L. R. 36 All. 469.

No appeal lies to the High Court against an order of the District Judge granting sanction which had been refused by the Munsif.

Criminal Procedure Code, sec. 350.

EMPEROR *v.* MANHUA, I. L. R. 36 All. 315.

Sec. 350, Cr. P. C., is not limited to cases in which Magistrates succeed each other in their offices but applies also to all cases transferred from the file of one Magistrate to that of another under sec. 528, Cr. P. C.

Indian Penal Code, sec. 193.

EMPEROR *v.* MUHAMMAD ISHAQ, I. L. R. 36 All. 362.

A man cannot be convicted of perjury for having acted rashly or for having failed to make reasonable inquiry with regard to the facts alleged by him to be true. It must be found that he made some statement or statements which he knew to be false or which he believed to be false or which he did not believe to be true.

Indian Penal Code, sec. 62.

EMPEROR v. GAYA PRASAD, I. L. R. 36 All. 395.

Sec. 62, I. P. C., should ordinarily be applied in cases of crimes against the State or affecting the safety of the public generally.

Criminal Procedure Code, secs. 195—439.

ASHAN ULLAH KHAN v. MANSUKH RAM, I. L. R. 36 All. 403.

There is nothing in sec. 195, Cr. P. C., which justifies the High Court in reconsidering the order of the Sessions Judge under cl. (b) of sec. 195 refusing to grant a sanction.

The revisional jurisdiction of the High Court under sec. 439, Cr. P. C., can always be exercised in order to prevent a gross and palpable failure of justice. At the same time it should not be so exercised as to make one portion of the Code of Criminal Procedure conflict with another, as would be the case, were the High Court to permit the practice to grow up of invoking its interference in revision so as to give a right of appeal where such right is definitely excluded by other provisions of the Code of Criminal Procedure.

Notes of Cases

ENGLISH LAW COURTS.

HOUSE OF LORDS.—Before LORDS LOREBURN, DUNEDIN, ATKINSON and PARMOOR. *The Marquess of Clanricarde* v. *The Congested Districts Board for Ireland.* 10th December 1914.

Land acquisition for statutory purpose, if challenged as outside such purpose, must be positively proved to be so—Duty of Courts of Law, where the exercise of power of an administrative body which is authorized by Statute to acquire land compulsorily is questioned.

This was an appeal from a decision of the Court of Appeal in Ireland. The Appellant's case was that the Respondents were not *bonâ fide* seeking to acquire the Appellant's land under the compulsory powers possessed by them, under the Irish Land Acts. The Court of first instance held that the proceedings for compulsory acquisition were illegal and *ultra vires*, but its judgment was reversed on appeal, and the present appeal was dismissed.

LORD LOREBURN said as follows :—

When an administrative body was authorized by Statute to take land compulsorily for specified purposes, the Court would interfere if it used those powers for different purposes. Whether it did so or not was a question of fact. The administrative body must really intend to act for a statutory purpose, and the land they sought to take must be land which was capable of being made use of for the statutory purpose, by which he meant that, looking at the land as a whole, no man could in reason think the purchase could be utilized for any of the statutory purposes. That also was a question of fact. But any one who objected to what was done on either of these grounds must prove his objection. The Court would not interfere with the discretion or revise the opinion of the administrative body if there was anything on which it could in reason come to the conclusion it reached. Of course fraud or dishonesty stood on quite a different footing. When a board was set up with such compulsory powers as were possessed by the Congested Districts Board it was not intended that Court of Law should do what their Lordships had been invited to do, namely, dog its footsteps and peer into its minutes as if it were to be suspected of meaning more than it said, or trip it up on the ground that it had not acted judiciously or had not kept proper minutes, or upon any other ground, dishonesty apart, than that it had in fact exceeded its powers. Therefore the Appellant here was bound to prove affirmatively, either that the Board did not propose to take these lands for its statutory purposes—for the relief of congestion—or that these lands were so incapable of being used for such a purpose that the Board could not in reason believe they were capable. The latter was a very strong proposition to affirm, and if there was doubt about it, a Court of law had no jurisdiction to interfere, because the discretion had been committed, not to them, but to the Board.

Messrs Samuel Brown, K. C., W. M. Jellet, K. C., and *John W. Hynes, K. C.*, for the Appellant.

Messrs. Ronan, K. C., Denis Henry, K. C., and *Edmond Coll* for the Respondents.

B. D.

COURT OF APPEAL.—Before LORDS JUSTICES BUCKLEY, PHILLIMORE and PICKFORD. *Wiffen* v. *Bailey and the Romford Urban District Council.* 18th November 1914.

Action for malicious prosecution—Plaintiff must prove that he suffered damage.

This was an appeal by way of new trial in an action tried before Horridge, J., and a jury. The Defendant Council on the report of its Sanitary Inspector prosecuted the Plaintiff for

not abating a nuisance alleged to be existing on the Plaintiff's premises. The Justices dismissed the complaint with costs. The Plaintiff then brought the present action against the Council and its Sanitary Inspector for damages for malicious prosecution. The Defendants pleaded that they had reasonable and probable cause for the Plaintiff's prosecution, and that the action would not lie against them without proof of a special damage.

At the trial, questions were left to the jury, which, with their answers, were as follows:—

(1) Did the Defendants or either of them take reasonable care to inform themselves of the true state of the case?—No, neither.

(2) Did the Defendants or either of them honestly believe the case they laid before the Magistrates?—No, neither.

(3) Were the Defendants or either of them actuated by any indirect motive in preferring the charge?—Yes, both.

(4) Was the Defendant Bailey acting *bonâ fide* under the directions of the Defendant Council for the purposes of executing the Act?—No.

(5) Was it a necessary and natural consequence of the prosecution to damage the Plaintiff's fair fame?—Yes.

(6) Damages, if any?—£250 against the Defendant Council, not Bailey.

The Court below held that the proceeding against the Plaintiff involved damage to the Plaintiff's fair fame sufficient to maintain the action, and, therefore, allowed the claim. The Court allowed the appeal, dismissing the claim.

LORD JUSTICE BUCKLEY in the course of judgment observed:—That the action of malicious prosecution would not lie unless the Plaintiff could show that he had suffered one or other of the three sorts of special damage enumerated by Lord Holt in *Savile* v. *Roberts* (1 Ld. Raym., 374). The three heads were (1) damage to his fame, as if the matter whereof he was accused was scandalous; (2) damage to his person, as where he was put in danger to lose his life or limb or liberty; (3) damage to his property, as where he was forced to expend his money in necessary charges to acquit himself of the crime of which he was accused. The action of malicious prosecution was not confined to cases of criminal proceedings; it might extend to cases of civil proceedings, though the cases in which it was so extended were few. But if there was no scandal, and no danger of imprisonment, and no damage to property, the action would not lie.

In the present case, damage to property was out of the question. Neither was this a case of danger of imprisonment. Did the case, then, fall under the first head? In order to bring a case under the first head, the Plaintiff must show that damage to his fair fame was the necessary and natural consequence of the proceedings complained of; see judgment of Lord Justice Bowen in *Quartz Hill Gold Mining Co.* v. *Eyre* (11 Q. B. D. 674). A summons for non-compliance with a notice to abate a nuisance under the Public Health Act, 1875, was in a sense a criminal proceeding; but the imputation conveyed by it did not necessarily and naturally attack the fair fame of the person on which it was served. The Act provided for the serving of the notice and the summons on the occupier of the premises in question, and it might well be that the occupier was not in any way responsible for the existence of the nuisance. He was therefore of opinion that the action was not maintainable.

Messrs. Compston, K. C., and *Maddocks* for the Appellants.

Messrs. Jones and *Crew* for the Respondents.

B. D. *Appeal allowed with costs.*

KING'S BENCH DIVISION.—Before MR. JUSTICE ATKIN. *C. Groom, Ld.* v. *Barber.* 18th November 1914.

Policy of Insurance on c. i. f. terms—Effect of war risks thereon—When property pass in goods appropriated to contract.

In 1914, Mr. Barber, the Respondent, sold to Messrs. C. Groom (Limited), the Appellants, 100 bales of cloth for shipment from Calcutta to London on c.i.f. terms. Among other things, the contract of sale provided that

"(1) Should the goods or any portion thereof not arrive from any loss of vessel or unavoidable cause, the tender of the buyer of the insurance policy with the bill-of-lading or other document which with the policy will enable the buyer to recover the amount of the insurance from the under-writers shall be deemed a good tender of the goods.

"(5) Ship's name to be declared by the first seller without undue delay, and any declaration so made shall be valid as regards successive buyers if passed on without undue delay. . .

"(8) War-risk for buyer's account."

The seller had entered into a corresponding contract for the supply of the goods with Messrs. Becker and Gray, of Calcutta, and on July 15th, 1914, this firm shipped at Calcutta 25 bales by the *City of Winchester*. On the following day the shippers took out an insurance

policy on the goods which did not cover war-risk. The shipping documents were sent to London. On August 3rd, Mr. Barber wrote to Messrs. Groom (Limited) pointing out that the war-risk was for their account, and that the risk must be covered by them to protect their own interests, and on August 12th, the latter firm asked for the name of the boat by which the goods were coming, so that the goods might be so covered. Mr. Barber replied that he did not know, but on August 20th, he received the information that they were to be shipped in the *City of Winchester*, and he immediately advised Messrs. Groom (Limited), and tendered the documents. On the following day the steamer was posted at Lloyd's as lost. She had been captured and sunk on August 6th by the German cruiser *Königsberg*. In these circumstances Messrs. Groom (Limited) refused to take any responsibility. Reference was made to arbitration, Mr. Barber claiming payment at the maturity of the shippers' draft of £441 2*s*., while Messrs. Groom (Limited) contended that they were entitled to refuse the documents and regard the contract as unfulfilled. The arbitrator found that Messrs. Groom (Limited) were responsible for war-risk, and directed them to pay to the seller the sum claimed and costs. Messrs. Groom (Limited) now appealed.

MR. JUSTICE ATKIN, in delivering judgment, said :—At the arbitration the first point that was made was that the policy of insurance which was tendered with the documents was not in order, because it ought to have covered war-risk or because there ought to have been a separate policy covering war-risk. The arbitrators found that by the custom of the trade the tender of a policy such as this, containing the f.c. and s. clause, was a sufficient tender within the meaning of the contract or that there was no custom of the trade of effecting any war-risk insurance for the buyer's account. I think, it is a question of a contract on c.i.f. terms as stated by Mr. Justice Hamilton in *Biddell Brothers* v. *Clemens Horst Company* [(1911) 1 K. B., 220, 227]. The learned Judge there says that a seller in a contract of sale is, among other things, "to arrange for an insurance upon the term current in the trade which will be available for the benefit of the buyer," and I am satisfied that at the time when this contract was made, the terms current in the trade would be terms which would not include war-risks. I think therefore that apart from the special terms of the contract a policy in such terms would be in order.

But in this contract there are the words, "War-risk for buyer's account." Those words mean that the war-risk is the buyer's concern and that if he so desires he must get it covered.

The next point raised a question of general interest on contracts on c.i.f. terms. It is said that the seller could not tender documents representing goods which were lost at the time of the tender, because at the time of the loss there had been no goods appropriated to the contract so as to pass the property in the goods to the buyer. It is said also that the goods which were tendered were non-existent, and therefore the documents were not in order. In my opinion, the contract of the seller is performed by the delivery of the documents within a reasonable time after shipment. The documents should be ordinarily the bill-of-lading, the invoice, and the policy of insurance which will entitle the buyer to obtain on the arrival of the ship delivery of the goods, or will enable him to recover on this policy the value of the goods if lost by peril agreed in the contract to be covered, and in any case will give him any rightful claim against the ship in respect of any misdelivery or wrongful treatment of the goods. It therefore becomes immaterial whether before the date of the tender of the documents the property in the goods was the seller's or buyer's or some other person's. The seller must be in a position to pass the property in the goods by the bill-of-lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill-of-lading to the particular buyer until the moment of tender, nor need he have obtained any right to deal with the bill-of-lading until the moment of tender. The seller's obligation cannot depend upon whether the goods are lost or not, and if when there is no loss, the property has to pass to the buyer before delivery of the documents, at what stage of the transaction must it pass? Unless it be at the time of shipment, I can see no reason for fixing upon any other time than of the delivery of the documents, and if it be the law that a tender of documents otherwise sufficient is ineffectual, unless in fact at the moment of shipment the property actually passed to the ultimate buyers, it appears to me that business operations would be seriously embarrassed. The award of the arbitrator in favour of the sellers stands.

Messrs. Maurice Hill, K.C., and *Darby* for the Appellants.

Mr. F. D. Mackinnon for the Respondent.

B. D. *Appeal dismissed with costs.*

CHANCERY DIVISION.—Before MR. JUSTICE ASTBURY. *Richards* v. *Bostock.* 18th November 1914.

Solicitor without a duly stamped certificate instructing Counsel, if would invalidate whole proceedings.

In this action, after Counsel for the Plaintiff had concluded his opening speech, the Counsel for the Defendant took a preliminary objection to the trial of the action. It was to the effect that the Plaintiff's Solicitor was a Solicitor who held a country certificate only, and that under the Stamp Act, 1891, he was not competent to practise in the High Court without paying the Stamp Duty required by the Act, and which he had not done. In other words, the Plaintiff's Solicitor was not competent to instruct Counsel for the Plaintiff, and therefore the proceedings could not continue. Counsel for the Defendant submitted that the action should be dismissed on the ground that the proceedings were void. The learned Judge ruled against that contention, and adjourned the case to enable the Plaintiff to consult another Solicitor, or take other necessary steps. He said:—

"In *Sparling* v. *Brereton* [(1866) L. R., 2 Eq., 64], where a solicitor had not renewed his certificate, Vice-Chancellor Wood refused to invalidate proceedings begun by the Solicitor on behalf of a Defendant, saying:—'It would be most mischievous indeed if persons without any power of informing themselves on the subject should be held liable for the consequences of any irregularity in the qualification of their Solicitor.' The question of costs will be reserved until trial of the action."

Messrs. Frank Russell, K.C., and *Johnston* for the Plaintiff.

Messrs. Micklem, K.C., and *Church* for the Defendant.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before HOLMWOOD and CARNDUFF, JJ. APPEAL FROM APPELLATE DECREE NO. 1412 OF 1911. ANGNI GHAZI AND OTHERS, Defendants, Appellants *v.* CHAITHU PATRAS AND ANOTHER, Plaintiffs, Respondents. 7th December 1914.

Chota Nagpur Tenancy Act, sec. 11—Registration—Granting by settlement-holder to a landlord of a copy of khewat—Khewat containing name of certain person as the holder of a tenure—Transfer of tenure—Entry in record-of-rights, effect of.

This second appeal was remanded to the lower Appellate Court for a finding whether the Plaintiffs' claim was barred by sec. 11 of the Chota Nagpur Tenancy Act. The lower Appellate Court treated the issue as if it was whether the Plaintiffs' suit was barred by that section, which was rather a different question. It held that the entry in the finally published record-of-rihts, a copy of which was served on the zamindar, amounted to registration, and that the Plaintiffs' suit was therefore not barred. The question in the case was, whether the Plaintiffs were entitled to recover rent for the period between the acquisition of their title to the tenure and the application for registration in the landlord's *sherista.*

Held, that the Plaintiffs could not recover the rent claimed.

The right to the rent of an estate was in the true proprietor, although unregistered, and his right to sue for rent was not taken away by anything in the sections of the Act, which did not affect his cause of action, but merely put an impediment in the way of his realising the rent, till he complied with the law by obtaining registration.

The Plaintiffs could not under sec. 11 of the Chota Nagpur Tenancy Act recover any rent for the period prior to their application to the landlord for registration in his office. Any application they might make during the pendency of the suit or in future would not operate retrospectively and their claim for rent was altogether barred and would remain barred as to the rents prior to the date of application, even when they complied with the provisions of the Act. The entry in the record-of-rights gave them only the presumption of possession under the title they claimed; but it could not give them the right to receive rent which was barred by the statutory provisions of the Rent Law and such entry could not take the place of the procedure which the Law has laid down as a condition-precedent to the collection of rent.

Babus Harihur Prosad Singh and *Rajeswari Prosad* for the Appellants.

Babu Kulwant Sahay for the Respondents.

A. T. M. *Appeal decreed.*

RAKHAL DAS SINHA v. THE KING-EMPEROR.

a breach of the peace, unless those ulterior consequences are made the basis of the proceedings.

The law as regards preservation of public peace is based upon an apprehension that either certain person or persons are likely to commit breach of the peace by their own acts or that they are likely to do wrongful acts which may occasion other people to commit breach of the peace.

This was a Rule granted on the 16th April 1912, against an order, *ex parte*, passed by Babu Gati Krishna Neogi, Sub-divisional Magistrate of Narail, on the 5th March 1912, under sec. 144, Cr. P. C., directing the Petitioners to close the *hât* at Peruli, an application for the revision of which order was rejected by Mr. J. H. Lindsay, District Magistrate of Jessore, on the 15th March 1912.

On the report of the Sub-Inspector of Police at Gazirhat, proceedings under sec 144, Cr. P. C., were instituted against the Petitioners before the Sub-divisional Magistrate of Narail, on 5th March 1912.

The proceedings were in respect of a newly established *hât* at Peruli which is on the opposite bank of a *khal* on which Gazirhat is situate and is held on days other than those on which Gazirhat is held.

The Sub-divisional Magistrate on the day of the institution of the proceedings passed an order, *ex parte*, under sec. 144, Cr. P. C., ordering the Petitioners to close the *hât* at Peruli. A motion to the District Magistrate was rejected by him on 15th March 1912.

Against this order of the Sub-divisional Magistrate the Petitioners moved the High Court and obtained the present Rule.

The Rule was in the following terms :—

"Let the record be sent for and let a rule issue calling on the District Magistrate of Jessore to shew cause why the order of the 5th March should not be set aside on the ground that it is not within the jurisdiction of the Magistrate to prohibit the holding of the *hât* altogether; he can only give such directions as to dates, etc., as will prevent obstruction, annoyance or disturbance to public tranquillity temporarily. In the meantime and until the disposal of the Rule further proceedings will be so far stayed as that the Petitioners will be allowed to open their *hât* on dates other than those on which the *hât* of the Opposite Party is held."

Babu Hemendra K. Das for the Petitioners.

Mr. Pugh for the Crown.

Babu Monmatha Nath Mukerjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

We are of opinion that this Rule must be made absolute on the ground on which it was issued. As a matter of fact, the order expires on its own force in the next three days and therefore there is not much occasion to set it aside now. But we wish to emphasise the clear distinction between interfering with the rights of private proprietors with whatever ulterior motive they may do acts which they have a right to do and the perpetration of wrongful acts by such proprietors. The law as regards preservation of public peace is based upon an apprehension that either certain person or persons are likely to commit breach of the peace by their own acts or that they are likely to do wrongful acts which may occasion other people to commit breach of the peace. And the question whether secs. 144, 107 or 145 should be utilised for the purpose is a matter within the discretion of the Magistrate. What we want to point out is that hold-

ing of a *hât* on a man's own property is not in itself a wrongful act and therefore any ulterior consequence which may arise from it cannot give rise to any proceeding against the owner of the land for committing an act likely to cause a breach of the peace unless those ulterior consequences are made the basis of the proceedings. And in the present proceedings the only ground mentioned for the issue of this injunction was that the Magistrate was satisfied from a report of the police that by opening a new *hât* at Peruli only half a mile from the old and long established *hât* at Gazirhat, the Petitioners were about to disturb the public tranquillity. Now an order in that form is in our opinion without jurisdiction. Under sec. 144, Cr. P. C., a Magistrate is empowered to direct the parties to take such order with their property as may be necessary to prevent obstruction, annoyance, or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety or a disturbance of the public tranquillity, or a riot or an affray. Now directing a man not to use his property in a lawful manner (for the establishment of a *hat* is a perfectly lawful act) cannot, in our opinion, come within the purview of this section. What the Magistrate ought to have ordered these people to do is not to obstruct or allow their servants in any way to obstruct the public or any other person from crossing the *khal* from their side in order to attend the Gazirhat market if he wished to do so. That is really what the Magistrate finds and tells us in his explanation is the cause of the present proceedings. It is not that the Petitioners are not entitled to hold a *hât*, but that its promoters did not shrink from using threats and, if necessary, force to compel the public to go to their *hât* and to prevent them from going to the Gazirhat market. The strongest measures should be taken by the local authorities to put down any such lawless acts; and the powers which are vested in the Magistrate are, in our opinion, ample enough to prevent any such interference with the liberties of the subject. But an injunction cannot be issued not to do a lawful act upon a man's own property. It is therefore necessary to set aside these proceedings and to make the Rule absolute.

Rule made absolute.

PRIVY COUNCIL

[APPEAL FROM BENGAL.]

LORD DUNEDIN. LORD SHAW. SIR JOHN EDGE. MR. AMEER ALI 1914, Heard, 22 and 23, October. Judgment, 25, November.	MAHOMED MUSA, since deceased (now represented by Mahomod Abdul Aziz and ors.), and ors., Appellants, v. AGHORE KUMAR GANGULI and others, Respondents.

Part-performance of contract not embodied in statutory form—Contract enforcible in equity—Principles, if applicable in India—Compromise, agreement to convey in—Conveyance not executed, but decree passed on the footing that transfer had been completed—Decree supplies defect—Parties who have acted on the compromise, if may be allowed to resile—Locus penitentiœ

The parties to a mortgage, dated 1848, entered into an agreement in 1870, under which the mortgagee was to take over management of the mortgaged property under a power-of-attorney from the mortgagor, collect the rents from the putnidar, *apply a certain amount annually out of it in discharge of the mortgage debt and pay the balance to the mortgagor. In 1871, a second mortgage was effected. The* putnidar's *estate thereafter having passed into the hands of the Collector, as manager of the Court of Wards, and the Collector having refused to pay rents to the mort-*

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gagee, the latter in 1873 sued the mortgagor and the Collector for enforcement of the agreement of 1870. In this suit, the mortgagor and mortgagee entered into a compromise which was embodied in a razinama *whereby the mortgagor agreed to execute a conveyance of a 12 as. odd share in favour of the mortgagee, the mortgagor retaining the remainder disburdened of debt. The* razinama *concluded with a prayer that the Court should "decide the suit declaring that the Plaintiff mortgagees should get the amount claimed to their satisfaction in the manner stated above", and the Court passed order thereon that "the suit be decided in pursuance of the terms of the* razinama, *and that the suit be struck off from the list of pending cases". No formal conveyance was executed, but the compromise was acted upon by all the parties to it and their successors-in-title until 2nd January 1908 when the successors-in-title of the mortgagors instituted the present suit for redemption of the two mortgages of 1848 and 1871.*

Held—*That no written conveyance was necessary to give effect to the transfer, the Transfer of Property Act not having been passed until 1882.*

That any defect in the razinama *was made good by the decree which proceeded on the footing that the parties to the suit had in fact arranged their rights to the property in terms of the compromise, and the equity of redemption was extinguished.*

That even if the razinama *and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the acting of the parties had been such as to supply the defect.*

Under English law, equity will not fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. The law of India is not inconsistent with the principles applied by equity in such cases but on the contrary follows them.

MADDISON *v.* ALDERSON (1), *followed.*

This was an appeal from a judgment and decree, dated the 16th June 1909, of the High Court of Judicature at Fort William in Bengal (Chitty and Carnduff, JJ.), which reversed a judgment and decree, dated the 31st August 1908, of the Subordinate Judge of 24-Parganas.

The Plaintiffs-Appellants sued to redeem two mortgages, dated the 22nd July 1848, and the 4th April 1871. The Subordinate Judge allowed the claim, but the High Court held that the mortgages had ceased to subsist long ago, and dismissed the suit. The litigation related to two properties, namely, Pargana Aminpur Balanda bearing Tauzi No. 586 and Lakhéraj resumed zamindari called Mauzas Ranigachhi and Gobardhanpur bearing Tauzi No 1161 situate in the Collectorate of 24-Parganas They originally belonged to Munshi Fazlul Karim. By a mortgage, dated the 22nd July 1848, Fazlul Karim hypothecated the two properties in suit along with certain other properties to one Ram Chand Mukerji to secure the loan of Rs 1,40,000 with interest. He subsequently conveyed the properties in suit to his wife Khodajennessa Bibi by a bill of sale, dated the 20th September 1850, subject to the mortgage. In 1851 Khodajennessa Bibi filed a suit for redemption of the said mortgage against the said mortgagee and her husband in the Supreme Court of Calcutta. By consent of the parties the Court made a decree, dated the 18th February 1851, the terms of which were subsequently varied by the Court by an order, dated the 2nd December

(1) 8 A. C 467 (1883).

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1857. Some proceedings were instituted in the Supreme Court which led to a reference to the Master of that Court, but the parties did not proceed with the reference. On the 16th August 1853, Khodajennessa Bibi granted a *putni* lease of the properties in dispute to one Prannath Rai Chowdhuri. The rent reserved was Rs. 35,100 per annum. Of this the Government revenue was Rs. 19,888 odd leaving Rs. 15,511 odd *malikana* for the lessor. On the 20th May 1856, Fazlul Karim died leaving his widow, three sons and two daughters him surviving. The mortgagee Ram Chand Mukerji also died on the 1st October 1862, leaving three sons, namely, Panchanan (who was the eldest), Ramlal and Sashi Bhusan (Respondent No. 1). By his Will Ram Chand Mukerji bequeathed the money due on the said mortgage to his three sons in equal shares and appointed them executors to his Will. The sons proved the Will and took out the probate.

The parties renewed the said mortgage transaction by an agreement, dated the 14th November 1870. The parties to it were Khodajennessa Bibi of the one part and Panchanan, Ramlal and Sashi Bhushan (sons of the said mortgagee) of the other part with the object of discharging the amount of the principal and interest then due on the said mortgage. The agreement made the following provisions :—

(1) That Khodajennessa Bibi should execute an irrevocable power-of-attorney in favour of the said Panchanan authorising him to collect the rents and profits of the mortgaged properties from the *putnidar*

(2) That Panchanan was to apply in each and every year the sum of Rs. 12,000 first in payment of interest, and next in payment of the principal of the mortgage debt due to himself and his brothers.

(3) That Panchanan was to obtain possession of and to manage and to protect the said properties and to render an account of his collections and management and to pay the surplus over to Khodajennessa Bibi and her heirs.

(4) That when the mortgage debt was fully discharged, Panchanan's authority would come to an end, and he would be bound to deliver peaceful possession of the properties in suit free from the mortgage.

In accordance with this agreement Khodajennessa Bibi executed an irrevocable power-of-attorney, dated the 14th November 1870, in favour of Panchanan who accepted the terms thereof for himself and for his brothers. In pursuance of the agreement Panchanan obtained possession of the properties in suit and made collections of the rents and profits thereof from the said *putnidar*.

On the 4th April 1871 the said Khodajennessa Bibi executed a second mortgage of the properties in dispute in favour of Arun Prakash Ganguli, predecessor-in-title of Respondents Nos. 1 and 2. Khodajennessa died intestate on the 7th July 1890, leaving all her sons and daughters.

On the 2nd January 1908, the Plaintiffs who were the surviving heirs of the said Khodajennessa Bibi instituted the present suit for redemption in the Court of the Subordinate Judge of 24-Parganas.

Defendants Nos. 1 to 4 filed written statements. The written statement of Defendant No. 1 supported the Plaintiffs' case. Among other things they pleaded—

First, that the first suit for redemption which was instituted by the said Khodajennessa Bibi in 1851 having been dismissed for default of prosecution, the present suit was barred by *res judicata;* and

Second, that in a suit (No. 87 of 1873) which was instituted by the said Pancha-

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nan and his brothers against the said Khodajennessa Bibi, the latter filed a compromise which was made a decree of Court on the 6th December 1873, and that the mortgages ceased to exist after that compromise.

On the pleadings the Subordinate Judge framed several issues of which the following are now material :—

(6) Was the *razinama* acted upon by the parties? If so, would it affect the rights of Khodajennessa Bibi in the properties in suit? Are the Plaintiffs entitled in equity to ignore and nullify the effect of the same?

(7) Is the claim for redemption barred by the alleged decree, dated 18th February 1851, and the decree, dated 25th April 1863?

(8) Were the mortgages created on 28th July 1848 and on the 4th April 1871 discharged by the *razinama* (compromise), dated 26th November 1873, and the decree, if any, passed thereon? And was the equity of redemption in 12 annas odd gundas share released, and the said share absolutely made over by the said Khodajennessa Bibi?

The evidence shewed that on the death of the *putnidar* Prannath Rai Chowdhuri his estate passed into the hands of the Collector of 24-Parganas as manager of the Court of Wards. Panchanan began to realize the rent of the *putni* lease of the properties in suit from the said Collector, but he could not do so successfully. Panchanan and his two brothers thereupon instituted a suit (No. 87 of 1873) against Khodajennessa Bibi and the Collector. The Plaintiffs claimed that the agreement, dated the 14th November 1870, thereinbefore mentioned, was binding upon the said Khodajennessa Bibi, and they prayed that the said Collector of 24-Parganas be directed to pay the rent of the *putni* lease for certain years to the Plaintiffs. In the course of this suit a petition of compromise, dated the 26th November 1873, was presented to the Court on behalf of the said Khodajennessa Bibi. The terms of the compromise were as follows :—

"As I was unable to pay the said sum of Rs. 2,00,000, to the said Arun Prakash Ganguli and the Plaintiffs in cash, it was arranged that I should execute a deed of absolute sale in respect of 3 annas 1 gunda 3 karas 2 kags 5 tils share of the *malikana* in lieu of the sum of Rs. 50,000 due to Arun Prakash Ganguli, and 9 annas 5 gundas 2 karas 2 kags 15 tils share of *malikana* in lieu of the sum of Rs. 1,50,000 due to the three brothers, the Plaintiffs, jointly and in equal shares, as their father's due; in all, 12 annas 7 gundas 2 karas 1 kag share of the *malikana*, proportionately amounting to Rs. 12,000, the total *malikana* being Rs. 1,511-5-15, the amount of the net profits of my zamindaries aforesaid left after deduction of Rs 19,668-6-11, the Collectorate revenue of Taluk No 586, Pargana Aminpur Balanda, and Rs 220-3-4, the Collectorate revenue of Taluk No. 1161, Mauzas Ranigachhi Gobardhanpur, in all, Rs. 19,888-10-5, from Rs 35,100, the annual rent payable to me by the *putnidar* on account of the said zamindaries, the deed was commenced to be drawn up in the Attorney's office. The Plaintiffs and Arun Prakash Ganguli consented to such arrangement and released the said taluks and all the properties covered by the mortgage deed to me free from the liability for the debt Thus the *malikana* of Rs. 12,000 for 12 annas 7 gundas 2 karas 1 kag share due to Arun Prakash Ganguli and the Plaintiffs and the Collectorate revenue of Rs 15,386-7-10 proportionate to that amount, in all, Rs. 27,386-7-10 being set apart, there remains Rs. 8,013-8-10, being the sum of Rs. 3,511-5-15, the amount of profits proportionate to the remaining 3 annas 12 gundas 1 kara 3 kags share and Rs. 4,502-2-15, the amount of the Collectorate revenue, as surplus, proportionately due to me according to the terms of the *putni kabuliyat*. I shall realise this amount every year from the *putnidar* since Baisakh 1281. And the said Panchanan Mukerji shall on the strength of

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the said *mukhtarnama* realise through the Civil Court and the Collectorate the sum of Rs. 6,775 claimed as due from Chait 1279 to Sraban 1280, and Rs. 30,125 from Bhadra to Chait 1280, together amounting to Rs. 36,900, and the amount of Dak tax, etc., with interest due to me from the *putnidar*, and shall pay the Collectorate revenue and Dak tax, etc., for the said Taluks Nos. 586 and 1161, for the year 1280 up to Chait; and from the year 1281, the Plaintiffs and Arun Prakash Ganguli shall realise from the *putnidar* the *malikana* profits in respect of 12 annas 7 gundas 2 karas 1 kag share, and the Collectorate revenue both amounting to Rs. 27,386-7-10, as per account given above, and I shall realise the profits in respect of the remaining 3 annas 12 gundas 1 kara 3 kags share and Collectorate revenue both amounting to Rs. 8,013-8-10, kist by kist, according to the terms of the *kabuliyat*. The said *mukhtarnama* shall be cancelled from the year 1281 and the Plaintiffs and Arun Prakash Ganguli shall get their names registered in the Collectorate in respect of the said 12 annas 7 gundas 2 karas 1 kag share according to their respective shares, to which I and my heirs in succession shall have no objection, and no objections shall be raised by any party and their heirs in respect of all the aforesaid terms. I therefore beg to file this petition with the consent of the Plaintiffs and pray that the Court may be pleased to decide the suit declaring that the Plaintiffs shall get the amount claimed to their satisfaction in the manner stated above; and that the costs of the suit of each party shall be borne by each of them."

The Subordinate Judge recorded evidence both oral and documentary, and after examining it he delivered judgment on the 31st August 1908. He found all the material issues in favour of the Plaintiffs and made a decree allowing the Plaintiffs' claim to redeem the mortgage, dated the 22nd July 1848, as varied by the agreement, dated the 11th November 1870, as well as the mortgage, dated the 4th April 1871, and directing Defendants Nos. 1 to 4 to render accounts as prayed and to pay the costs of the suit to the Plaintiffs with interest at 6 per cent. per annum till realization.

Against this decree Defendants Nos. 2 to 4 appealed to the High Court of Judicature at Fort William in Bengal which delivered judgment on the 16th June 1909.

The High Court (Chitty and Carnduff, JJ.) reversed the Subordinate Judge's decree and dismissed the suit. In the course of their judgment they observed:

"With all respect to the learned Subordinate Judge, he does not appear in dealing with these issues to have correctly appreciated the undisputed facts of the case. He held that the *razinama* being insufficiently stamped and unregistered did not operate as a release of the equity of redemption; that the possession was all along with the mortgagees; that without actual delivery of possession there could be no transfer by parole; that the change in the mode of possession was not sufficient; and that the mortgages were still subsisting. There can be no doubt that a mortgagor is competent to release his equity of redemption. The question is whether Khodajennessa Begum in this case effectually did so. With regard to the *razinama* (Ex N) it may at once be conceded that it did not operate as such a release. It did not purport to do so, nor indeed to declare, create, or extinguish any right in immoveable property. It was a petition filed in Court by Khodajennessa Begum in Suit 87 of 1873, to the particulars in which the Mukerjis signified their consent. It is clearly admissible in evidence as an admission by Khodajennessa Begum of the agreement at which she had arrived with her mortgagees. No question of want of stamp or registration really arises in connection with the *razinama*, inasmuch as it could not from its terms be used for purposes which would necessitate stamping (otherwise than as a petition) or registration. In this respect the case is clearly distinguishable from *Biraj Mohini* v. *Kedar Nath* (3), where the compromise petition formed the root of the Plaintiff's title. With reference to the re-

(3) 12 C. W. N. 854 (1908).

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mark of the learned Subordinate Judge, that the terms of the *razinama* were not incorporated in the decree, and the *razinama* cannot be considered a part of it, we may notice that the suit was decided in pursuance of those terms, the *razinama* being on the Court file. The *razinama* is, however, very good evidence of what the parties had orally agreed to do. The question is, did they carry out that agreement? It was no doubt contemplated that the release should be effected by mutual conveyances Such documents were not, however, before the 1st of July 1882 (when the Transfer of Property Act came into force), necessary for the transfer of immoveable property The learned Subordinate Judge disposes of this portion of the case by remarking 'In this case the possession was with the mortgagees, and no valid transfer could be made' The ruling on which he relies in this connection has obviously no application, as it turned on the construction of sec 54 of the Transfer of Property Act [*Sibendra Pada Banerji* v *The Secretary of State* (4)] It is, however, by no means clear that the mortgagees were in possession even at the date of the *razinama* or up to 1st Baisakh 1281 (April 1874) Panchanan Mukerji, it is true, was receiving the whole rent under the *putni* lease, retaining Rs 12,000 for himself and his brothers, and making over the remainder to Khodajennessa Begum He was doing this by virtue of the power of attorney executed by her in his favour, and it might not unreasonably be argued that he was in that respect acting as her agent and not in his capacity as one of the mortgagees There is certainly not sufficient evidence in this case to support the conclusion arrived at by the learned Subordinate Judge, that Panchanan was *karta* of the family, and as such his possession must be regarded as the possession of all the three mortgagees This opinion is directly against the findings of this Court in Suit 277 of 1874, though no doubt those decisions are not binding on these Plaintiffs. Even if it were certain that the mortgagees were mortgagees in possession in December 1873, it is equally certain that very shortly after that they ceased to be so In August 1875, as has been stated, Khodajennessa Begum was applying for the separate payment of her 1/5th share of the income under the *putni* lease, and in October 1875, she executed the mortgage in favour of Mutty Lal Dhur The learned Subordinate Judge says that 'the recitals in that mortgage would not create title in favour of anybody'. They would not, but, as admissions by Khodajennessa Begum, they are practically conclusive that the release of the equity of redemption had been effected in the manner arranged, with the single exception that it was not embodied in registered deeds of conveyance, which, as we have said, were unnecessary From this time forward the parties have been in exclusive enjoyment of their several shares This again was confirmed by the registration proceedings in 1878, and by subsequent registration proceedings when the transfers of shares among the Mukerjis and Arun Prakash Ganguli took place That there was good consideration for the release by Khodajennessa Begum, there is no doubt For her surrender to the mortgagees, of 4/5ths of the properties now in suit, comprised in the *putni* lease, she obtained a complete discharge from the whole debt on both mortgages amounting to rupees two lakhs, and took over 1/5th of those properties and all the other properties comprised in the mortgages of 1818 and 1871, free from all liability In these circumstances we hold that the arrangement of 1873 was carried into effect, and that the mortgages of 1818 and 1871 were thereby extinguished. We are unable to see that sec 92, proviso (4) of the Evidence Act, has any bearing on the case

(4) I. L. R. 34 Cal. 207 (1907).

Hence this appeal.

Mr L DeGruyther, K C, and *Mr. Bhugwandin Dube* for the Appellants submitted that the burden of proving that the mortgages in question had been extinguished was upon the Respondents, and that they had failed to discharge it. The decree, dated the 28th November 1873, did not extinguish the mortgages It simply provided that the suit in which that decree was passed should be decided in pursuance of the terms of the compromise. The compromise was ineffectual in law to create

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in favour of the Respondents any right or title to the mortgaged properties, because it was not registered: *Pranal Annee* v. *Lakshmi Annee* (5). In construing the decree, regard must be had to the nature of the suit. It was a suit for money and for a declaration that the agreement of the 14th November 1870 was legally valid. The reliefs claimed in the suit were allowed by the decree. The decree did not operate to release the mortgaged properties from the equity of redemption, and that was conceded by the learned Judges of the High Court also. Unless there was something in the conduct of the mortgagor, which operated as an estoppel, the mortgages were still subsisting. At the most Khodajennessa entered into an agreement to execute a conveyance, and to extinguish the equity of redemption upon certain terms and conditions, but no such conveyance was ever executed by her Under sec. 92, proviso 4, oral evidence could not be given to extinguish or to modify written and registered mortgages. There was nothing in the conduct of the parties which definitely put an end to the mortgages. Disputes about the mortgages were always going on between them, between 1873 and 1882. As between mortgagor and mortgagee, neither exclusive possession by the mortgagee for any length of time, short of 60 years, nor any acquiescence by the mortgagor, which did not in fact amount to a release of the equity of redemption, would bar a suit for redemption: *Khiarajmal* v. *Diam* (6).

Mr. W. H. Upjohn, K.C., and *Mr. A. M. Dunne* for the Respondents submitted that the mortgages were extinguished after the date of the decree made in terms of compromise. The agreement made between the parties, to release the equity of redemption, was not a written one, but verbal. Prior to 1882, when the Transfer of Property Act came into force, no written agreement or conveyance was necessary. Sec. 92, proviso 4, embodied the law of evidence and not substantive law. The Respondents had not given oral evidence for the purpose of modifying or contradicting the mortgages. They were simply proving that a sale was made to them by parol agreement, and they proved it by oral and documentary evidence. Further, the conduct of the parties ever since the date of the oral sale has been consistent only with the completed release of the equity of redemption and the extinction of the mortgage debts. In fact Khodajennessa herself said so. Reference was made to the following authorities:—

Maddison v. *Alderson* (1), and *Rose* v. *Watson* (7).

Mr. L. DeGruyther replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 16th June 1909. That judgment was pronounced upon and reversed a judgment and decree of the Second Subordinate Judge of the 24-Parganas, dated the 31st August 1908.

The object of the suit is for the redemption of two mortgages, dated 22nd July 1848 and 4th April 1871. The defence which has been sustained is that the right to redeem was extinguished many years ago, in circumstances which will now be mentioned.

(5) I. R 26 I A 10', 105: s. c. 3 C. W. N. 485 (1899).

(6) L. R. 32 I. A. 23: s. c. 9 C. W. N. 201 (1904).

(1) 8 A. C. 467 (1883).

(7) 10 H. L. 672 (1864).

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Many of the facts of the case are comprised in a chapter which may be said to have definitely closed in the year 1873; and it is accordingly unnecessary to narrate them in detail. After the 1848 mortgage was granted by one Fazlul Karim, his wife Khodajennessa obtained from him a conveyance of her husband's zamindary as a gift in lieu of dower. This occurred in 1850. In 1851 she began proceedings for redemption of the mortgaged properties. Many and various legal steps took place in that decade and from at least the year 1863 no record remains of any proceedings in the suit. It is admitted that no useful light can now be thrown upon that litigation, —which, in any view, appears never to have been determined.

In 1870 a certain agreement was executed by Khodajennessa Begum and three sons of one Ram Chand Mukerji in reference to the 1848 mortgage. A sum was fixed as the principal due and another sum as interest due, and arrangements were made for payment by yearly instalments and for management of the property and the like.

On 4th April 1871 the second mortgage was granted. In 1873 differences, however, arose between Khodajennessa and the mortgagees, and a suit was brought by Ram Chand Mukerji's three sons to enforce against her the agreement come to. This suit was compromised. On 26th November 1873 Khodajennessa entered into a *razinama* or agreement of compromise, which *razinama* was signed by the Plaintiffs. What happened under it may be expressed in Khodajennessa's own words in evidence given by her in a litigation in 1875, and printed on the record. In that suit on 30th April she testified as follows :—

"The suit in the 24-Parganas Court was settled and a *solenama* executed by the three brothers, a deed of compromise, what is termed a *razinama* and *safinama*. On my agreeing to execute a conveyance of the 12 annas share to the three brothers, it was settled. The three brothers and myself all agreed and made the settlement. I spoke to all the three brothers on the subject of that settlement."

The *razinama* contains a full narrative of the transactions with the property mortgaged, and of the financial embarrassments which had occurred. It appeared, as was the fact, that after the death of the *putnidar* of the property the realisation of the rents had come under the charge of the Court of Wards. And the true point, so far as the present litigation is concerned, of the *razinama* was this, that it was arranged that from the year 1874 onwards the realisation of *malikana* profits should be as follows :—To the Plaintiffs in that case and Arun Prakash Ganguli "the *malikana* profits in respect of 12 annas, 7 gundas 2 karas, 1 kag share and the Collectorate revenue both amounting to Rs 27,386-7-10 as per account given above, and I shall realise the profits in respect of the remaining 3 annas, 12 gundas, 1 kara, 3 kags share and Collectorate revenue both amounting to Rs. 8,013-8-10 kist by kist according to the terms of the *kabuliyat*." The other parties named were to get their names registered in the Collectorate. These parties, it may be mentioned, had expressly "consented to such arrangement and released the said taluks and all the properties covered by the mortgage deed to me free from the liability for the debt."

It is impossible to read this *razinama* without concluding that the mortgage debts were to be thenceforward for ever extinguished, that the property itself was to be divided among the parties in specific shares, and that with regard to one share —set forth as 3 annas, 12 gundas, 1 kara

and 3 kags—it was to become and be dealt with by Khodajennessa as her separate property disburdened of debt. The remainder of the 16 annas was also to be similarly and separately owned and enjoyed.

The concluding prayer of the *razinama* was :—

"That the Court may be pleased to decide the suit declaring that the Plaintiffs shall get the amount claimed to their satisfaction in the manner stated above."

The *razinama* was accordingly produced to the Court, which pronounced upon it as follows :—

"It is, therefore, ordered that the suit be decided in pursuance of the terms of the *razinama*, and that the suit be struck off from the list of pending cases."

The point which is made against giving effect to this compromise is that a conveyance was not made by Khodajennessa in completion of the contract of purchase narrated in the *razinama*. This is true. But no written conveyance by the law of India was at the date of that transaction necessary, the Transfer of Property Act not being passed until the year 1882.

But even if a transfer in writing had from a conveyancing point of view been omitted, or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the Appellants in the attempt made in the present suit to redeem the mortgages. For, the points against opening up the transaction are manifold, and are in their Lordships' opinion conclusive. The compromise has been acted upon by all the parties to it, and by their successors-in-title from that date to this. The suit was dropped, the division of shares of the property was made, and it may be said generally that from its date until the date of Khodajennessa's death in the year 1890, and, indeed, from that date until the present time, the property has been managed upon the footing of that division, of the extinction of the mortgage debts, of the division of the disburdened proprietary interests in the shares set forth in the compromise, and of the receipt and enjoyment of rents and profits accordingly. The detail need not be given.

As to Khodajennessa herself, her own view is set forth in her evidence as already given. A striking instance of her approbatory acting, or homologation, may be mentioned. In the same year, 1875, she executed a mortgage for her own 3 annas share, and in this deed she recites at length the whole transactions, the separation into shares and so forth.

Transactions of mortgage, sale, etc., have been also carried out by the other sharers with reference to their properties. And, in short, it may be said that for a period of between 30 and 40 years prior to the initiation of this suit the rights of all parties have been dealt with precisely upon the same footing as if Khodajennessa had made an express conveyance parting with the equity of redemption, and transferring allotted shares of the property itself to the mortgagees, and reserving one share to herself.

In these circumstances their Lordships are of opinion that the proposition that the equity of redemption still remains with the representatives of Khodajennessa cannot be maintained. Even if the *razinama* itself was insufficient, yet in their Lordships' view the decree of the Court, to the sufficiency of which an objection was taken in argument—was obtained upon one footing, and one footing alone, *i.e.*, that the parties to the suit had in fact arranged their rights in the property in terms of the compromise.

Their Lordships, in view of the argument strongly pressed upon them, think

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it right further to say that even although the *razinama* and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the actings of parties have been such as to supply all such defects. To use language common from very early times in Scotland, and highly approved in the case of *Maddison* v. *Alderson* (1) in the House of Lords, it is no doubt true that there is a *locus penitentiæ*, that is, "a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite, and has not yet been adhibited in an authentic shape." This is the situation where the parties stand upon nothing but an engagement which is not final or complete. But where the actings and conduct of parties are founded on, then in all such cases, to use the language of Professor Bell in his Principles, sec. 26, "*rei interventus* raises a personal exception, which excludes the plea of *locus penitentiæ*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obliger to take place on the faith of the contract, as if it were perfect; provided they are unequivocably referable to the contract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable."

Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison* v. *Alderson* (1), founded on such part-performance (and the part-performance referred to was that of a parol contract concerning land), the Defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. The Lord Chancellor then enumerates a series of acts referable to the parol contract, and he adds, "the matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded." Many authorities are cited in support of these propositions from English and Scotch law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange [*Potter* v. *Potter* (2)] may be here repeated: "if confessed or in part carried into execution, it will be bindng on the parties, and carried into further execution as such, in equity." Their Lordships do not think that the law of India is inconsistent with these principles. On the contrary, it follows them.

A review by their Lordships of the judgment of the learned Judges of the High Court of the case has convinced them that the facts have been correctly appreciated, and they concur with the legal result arrived at.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed with costs.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

(1) 8 A. C. 467, 475 (1883).

(2) 1 Ves. (Sen.) 441 (1750).

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Solicitors: *Messrs. Burton, Yeates and Hart* for the Respondents.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2040 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 19, 21 and 26, February.
Judgment, 26, February.

ABDUL GOFUR MANDAL and another, Defendants, Appellants.
v.
UMAKANTA PANDIT, Plaintiff, Respondent.

***Bengal Tenancy Act** (VIII of 1885), secs. 30, 188—*Shebaits, *joint—Suit for enhancement of rent if may be brought by one* shebait *alone—Joint trustees—Consent of co-trustee if authorises suit by some only—Authority to sue, necessity to prove—Joint landlords,* shebaits *if.*

Joint shebaits *are, in some respects, joint trustees.*

Where one of two shebaits *of an idol sued a tenant holding* debutter *land for enhancement of rent under sec. 30, Bengal Tenancy Act, making the other* shebait *a co-trustee, and alleging that the latter had ceased to reside in the village and was no longer interested in the management of the endowed property, and the Defendant* shebait *filed a written statement in which she stated that she had no longer any connection with the endowment and did not object to enhancement of rent at the Plaintiff's instance*:

Held—*That the Plaintiff and the* shebait *Defendant were joint landlords within the meaning of sec. 188, Bengal Tenancy Act, and the right to institute the suit vested jointly in them as* shebaits.

JAGADINDRA NATH ROY v. HEMANTA KUMARI DEBI (4), *followed.*

That to succeed in the suit both shebaits *should have joined as Plaintiffs, or Plaintiff should have made out a case that he was authorised by his co-*shebait *to maintain the suit on her behalf.*

That no foundation for a case of agency had been laid in this case.

That renunciation by the Defendant shebait *of her rights as co-*shebait *in a manner known to law should have been proved to justify the Plaintiff suing alone.*

(4) 8 C. W. N. 809: s. c. I. L. R. 32 Cal. 129 (1904).

This was an appeal from a decision of S. C. Mallick, Esq., District Judge, Nadia, dated 7th March 1912, modifying that of Babu Mohar Lal Dey, Munsif, Krishnagar, dated 26th May 1911.

The facts of the case will appear from the judgment.

Maulvi Wahed Hossain for the Appellants.

Babu Baranosibasi Mukerjee for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the first and second Defendants in a suit for enhancement of rent under sec. 30 of the Bengal Tenancy Act. The substantial question in controversy between the parties is, whether the suit is barred under sec. 188 of the Bengal Tenancy Act. That section provides that where two or more persons are joint landlords, anything which the landlord is under the Act required or authorised to do must be done either by both or all those persons acting together or by an agent authorised to act on behalf of both or all of them. The landlord is authorised to institute a suit for enhancement of rent under the provisions of sec. 30 of the Bengal Tenancy Act. Consequently if there are two persons who are joint landlords, a suit of this description must be instituted by them jointly, or by an agent

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authorised to act in this behalf. This position cannot be controverted and is supported by the decision of the Judicial Committee in the case of *Jotindra Nath Choudhury* v. *Prosanna Kumar Banerjee* (1). A suit of this description is not properly constituted if instituted by one of the joint landlords, with the other added as a party Defendant, for the principle recognised in *Luke* v. *South Kensington* (2) and *Re Flower* (3) has no application to this class of cases. Before we determine whether sec. 188 is applicable to the case before us, the relevant facts must be briefly recited. The case for the Plaintiff is that the land in the occupation of the Defendants is part of an endowed property dedicated to an idol Radha Kanta Thakur established by his predecessor. The Plaintiff admits that he and his brother were at one time joint *shebaits* of this property, and after the death of his brother he was treated as *shebait* by his widow Subashini Debi, the third Defendant in this litigation. The Plaintiff alleges that the third Defendant has ceased to reside in the village and that she is no longer interested in the management of the endowed property. He consequently brings this suit alone, but joins the widow of his brother as *pro formâ* Defendant in order that she may be transferred to the category of co-Plaintiff if she expresses a desire to that effect. The suit was resisted on the merits by the first two Defendants, that is, the tenants whose rent was sought to be enhanced. Amongst other defences, they contended that the suit could have been instituted only by the Plaintiff and his co-*shebait*, the third Defendant, jointly and that as the suit had not been framed in that manner, it was barred under sec. 188. The third Defendant filed a written statement in which she stated that she had no objection to the enhancement of rent at the instance of the Plaintiff and that she had no longer any connection with the endowment. The Courts below have overruled the objection taken by the tenant Defendants and have made a decree in favour of the Plaintiff. The first point for determination is whether the Plaintiff and the third Defendant are joint landlords within the meaning of sec. 188 of the Bengal Tenancy Act.

On behalf of the Plaintiff-Respondent it has been argued that the property is vested in the idol who is the landlord of the tenant Defendants, and, that consequently no question arises whether the Plaintiff and the third Defendant are joint landlords within the meaning of sec. 188. This contention is opposed to the decision of the Judicial Committee in the case of *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (4). It was pointed out by Sir Arthur Wilson in the case just mentioned that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that the property is so held; and probably this is the true legal view when the dedication is of the completest kind known to the law. But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the *shebait;* and this carries with it the right to bring whatever suits are necessary for the protection of the property, *for the right of suit is vested in the* shebait *and not in the idol.* It is plain consequently that the Plaintiff and the third Defendant are joint landlords. The

(1) 15 C. W. N 74 s. c. I. L. R. 38 Cal. 270 (1910).

(2) 11 Ch. D. 121 (1879).

(3) 27 Ch. D. 592 (1884).

(4) 8 C. W. N. 809: s. c. I. L. R. 32 Cal. 129 (1904).

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right to institute a suit for enhancement of rent under the provisions of the Bengal Tenancy Act is vested in them. An attempt, however, is made to meet this objection by the contention that each *shebait* is entitled to deal with the property as a manager; and it is urged that *shebaits* cannot be treated in all respects as trustees. It is not necessary to maintain the position that joint *shebaits* of an endowment are, for all purposes, joint trustees. But it is plain that, in some respects, at any rate, they have the status of joint trustees. This is clear from the decision of the Judicial Committee in the case of *Rajendra Nath Dutt* v. *Sheikh Mahomed* (5), where their Lordships pointed out that in a suit by three of four *shebaits* to set aside an alienation of an endowed property, the fourth *shebait* was a necessary party, although he had misconducted himself and was not in a position to join as a co-Plaintiff. The same view was adopted by this Court in *Bechulal* v. *Oliullah* (6) and *Kokilasari Dasi* v. *Mohunt Rudranund Goswami* (7), and by the High Court of Madras in *Mariyil Raman Nair* v. *Narayanam* (8) and *Ramanathum Chetty* v. *Murugappa Chetty* (9). The true principle is, as was stated in *Ex parte Griffin* (10), that the office of co-trustees is joint. They all form, as it were, a corporate body, and they must execute the duties of their office in their joint capacity. But it has been argued on behalf of the Plaintiff-Respondent that the case before us is governed by either of two different principles, namely, that one of two joint trustees is entitled alone to collect rent from tenants [*Townley* v. *Sherborne* (11)] or that one of two joint trustees is entitled alone to take action for the benefit of the trust with the consent of his co-trustee [*Messeena* v. *Carr* (12), *Brazier* v. *Camp* (13)]. As regards the first principle, it is sufficient to say that this is a suit not for realisation but for enhancement of rent. As regards the second principle, it is urged that the Plaintiff is entitled to maintain this suit alone, because the co-trustee, who has been joined as a *pro formâ* Defendant, declared in her written statement that she had no objection to the enhancement of rent at the instance of the Plaintiff alone. No doubt, the suit might be treated as maintainable, if it was established that the Plaintiff was an agent authorised to act on behalf of both the *shebaits*, within the meaning of sec. 188, and, as was observed in the case of *Gopi Nath Chakraburty* v. *Uma Kanta Das Roy* (14), the authority may be conferred either orally or in writing. In the case before us, however, the Plaintiff has not laid the foundation for a case of agency. His allegation is that the co-trustee has ceased to be a trustee, not that he himself has been authorised by her to maintain this suit on her behalf. The Respondent has consequently been driven ultimately to take up the position that there has been a valid renouncement of the trust by the third Defendant. For this purpose, reliance has been placed upon the statement contained in the written statement of that Defendant to the effect that she did not desire to keep any connection whatsoever with the endowment. It has further been urged that the Defendant is a degraded woman, and, that, apart from any ques-

(5) I. L. R. 8 Cal. 42 (1881).
(6) I. L. R 11 Cal. 338 (1885).
(7) 5 C. L. J. 527 at p. 533 (1906).
(8) I. L. R. 26 Mad 461 (1902).
(9) I. L. R. 27 Mad. 192 (1903).
(10) 2 Glyn. and Jameson 166 (1826).
(11) 2 W. and T. L. C. 627 (629) (1634).
(12) L. R. 9 Eq 260 (262) (1870).
(13) 63 L. J. Q. B. 257 (1894).
(14) I. L. R. 24 Cal. 169 (1896).

tion of renouncement, she has forfeited her rights as a co-*shebait* No foundation, however, was laid in either of the Courts below for a case of this description It has not been shown that the thrid Defendant has renounced her rights as a co-*shebait* in any manner known to law; nor has authority been produced for the proposition that a Hindu widow, after she becomes a *shebait*, forfeits her rights as such *shebait* as soon as she lapses from the path of virtue and honour In fact, there is no evidence to show that the third Defendant is a degraded woman, or that she has ceased to be a co-trustee The suit has proceeded on the assumption that the Plaintiff, though one of two *shebaits*, is entitled alone to maintain it, that case has completely failed The Plaintiff and the third Defendant must for the reasons assigned, be deemed to be joint landlords, and, in that view, sec 188 is clearly a bar to the suit.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored, though not for the reasons assigned by that Court This order will carry costs both here and in the Court of Appeal below.

Appeal allowed

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1839 OF 1910.

CARNDUFF, J.
RICHARDSON, J.
1913,
Heard,
19, November.
Judgment,
26, November.

GURU CH. SAHA,
Defendant, Appellant,
v.
SURENDRA KRISTA RAY CHOWDRY, Shebait,
Plaintiff, Respondent.

Limitation Act (XV of 1877), sec 19--Acknowledgment of Plaintiff's title in statement of boundary of neighbouring land in* kabuliyat *executed by Defendant in favour of third party.

Where in stating the boundaries of lands included in a kabuliyat *executed by the Defendant in favour of a third party, he described the land in suit as Plaintiff's :*

Held—*That the statement amounted to an acknowledgment within the meaning of sec 19 of the Limitation Act*

It is now settled that an acknowledgment, to whomsoever made, if it be an acknowledgment pointing with reasonable certainty to the liability in dispute or the right out of which that liability arises as a legal consequence is an acknowledgment of liability within the meaning of that section

MANIRAM SETH *v* SETH RUPCHAND (3), MAJUMDAR HIRALAL *v* DESAI NARASILAL (4), IMAM ALI *v* BAIJ NATH (2) *and* MYLAPUR IYASAWMY MOODALIAR *v*. YEO KAY (1), *considered*

This was an appeal against a decree of Babu Kishori Lal Sen, Subordinate Judge of Zilla Dacca dated 11th March 1910, modifying a decree of Babu Umesh Ch Chakravarti Munsif at Naraingunj, dated 4th October 1909

The facts material to this report will appear from the judgment

Babus D N Chuckerbutty and *Gopal Ch Das* for the Appellant

Babus Jogesh Ch Ray and *Akshoy K Banerjee* for the Respondent

The JUDGMENT OF THE COURT was as follows

CARNDUFF, J The only question raised by this appeal is as to the interpretation and application of sec 19 of the Indian Limitation Act of 1877, under the provisions of which 'if, before the expiration

(1) I L R 14 Cal 801 (1887)
(2) I L R. 33 Cal 613 (1906).
(3) 10 C W. N. 874 ; s. c. I. L. R. 34 Cal. 1047 (1906).
(4) 17 C. W N. 573 (1913).

of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed ".

The Respondents are the *shebaits* of the deity Iswar Narasingh Jiu. The *akhrabari* of the *sheba* may be said to be divided in two by a path, and there is now no dispute except as to the northern portion, upon which a hut stands. In 1908 the *shebaits* sued to eject the Appellant who had entered on the land and erected the said hut more than 12 years before. It is conceded before us that the suit was out of time unless a *kabuliyat* executed in 1897 by the Appellant contains what amounts to an acknowledgment of liability within the meaning of the section which I have quoted. The Court of first instance held that it did not; but the lower Appellate Court took the opposite and, in my opinion, the right view.

The *kabuliyat* in question was executed by the Appellant in favour of certain members of the family of the Nawab of Dacca, who had no concern with either the suit or the *akhrabari*. It relates to several plots of land lying to the east of the road which runs along the eastern side of the *akhrabari;* and, in a schedule annexed to it, it describes the two plots farthest south in the following terms :—"(1) North of the *khal* of Town Bazar, east of the road to the east of the *karsa* lands of my *jama*, *mudafat* your *khas* tenant Akamuddi Bhistiwalla, and of the *akhra*-lands of Narasingh Jiu, south of the land No. 2, west of the lands held by the tenant Prasanna Kumar Dutt, appertaining to the *lakheraj* of Lukhi Narain Thakur. Within this boundary, the lands measuring 55 cubits in length from north to south and 46½ cubits in breadth from east to west. A six annas share thereof.

"(2) North of the aforesaid land No. 1, east of the road lying to the east of the lands *mudafat* the said Akamuddi and of the lands No. 3, south of the dwelling house of our ordinary tenant Lakshmi Baisnabi which has been made over to Shonakali Baishnabi in *miras* settlement, west of the lands No. 1 held by the aforesaid Prosanna Kumar Dutt. Within this boundary, the lands measuring 44 cubits from east to west and 42 cubits from north to south. A six annas share of the same."

It is now found as a fact that the Appellant purchased some land from Akamuddi Bhistiwalla in 1894, and that those lands were beyond, and immediately to, the north of the *akhrabari*. It appears further that the *khal* of Town Bazar which is mentioned as the southern boundary of the lands dealt with in the *kabuliyat* also runs along the south of the *akhrabari*. It would seem to follow that the Appellant, who in his evidence accepted full responsibility for the details set forth in the *kabuliyat*, in that document admitted by necessary implication, if not by express words, that the whole of the land originally in dispute was the property of the deity Narasingh Jiu. This is the view of the learned Subordinate Judge, which I am disposed to regard as a finding of fact that cannot be interfered with on second appeal. And, in any case, it is a finding which strikes me as most reasonable and which I should not be prepared to reject. I take it, then, that in the *kabuliyat* of 1897 the whole of the land originally in dispute, including the northern part of it which

is still in dispute, was admitted by the Appellant to appertain to the *akhrabari*.

But the learned vakil who appears for the Appellant relies on the ruling of the Privy Council in *Mylapur Iyasawmy Moodaliar* v. *Yeo Kay* (1) as explained by this Court in *Imam Ali* v. *Baij Nath* (2) and contends, *first*, that there is here no admission of any liability to be evicted, and, *secondly*, that an acknowledgment such as this addressed to a stranger and, so far as appears, not communicated to the other side is not an acknowledgment of liability within the meaning of the section.

Now these cases, no doubt, lend support to the learned vakil's contentions; but there are two very recent pronouncements of the Judicial Committee which are so distinct as to require neither supplement nor explanation, which were delivered after the decision of this Court above referred to, and which seem to me to dispose of the matter finally. Their Lordships' judgment in the case of *Maniram Seth* v. *Seth Rupchand* (3) now makes it clear that, if a person admits a right, it is a necessary implication that he also admits the legal consequences of that right; so that where, as here, a person admits that land, of which he is in possession at the time, is the property of another, he admits that he is liable to be made to restore it to that other. And the case of *Majumdar Hiralal* v. *Desai Narsilal* (4) meets the remaining contention; for in the course of the argument both *Mylapur Iyasawmy Moodaliar* v. *Yeo Kay* (1) and *Imam Ali* v. *Baij Nath* (2) were cited and relied upon by the Appellants, and it is manifest from the remark which Lord Moulton is reported to have made, that the *ratio decidendi* was the absence from the Indian Acts of the words in the English statutes which restrict the acknowledgment of right contemplated by them to such as are made "to the person entitled thereto or to his agent". "It is enough," observed his Lordship, that those words are not in the Indian statutes. You wish they were there".

It seems to me, therefore, to be now settled that an acknowledgment, to whomsoever made, if it be an acknowledgment pointing with reasonable certainty to the liability in dispute or the right out of which that liability arises as a legal consequence, is an "acknowledgment of liability" within the meaning of sec. 19 of the Limitation Act of 1877 or the corresponding sec. 19 of the new Indian Limitation Act of 1908. Consequently I would dismiss this appeal with costs.

RICHARDSON, J.—I agree.

Appeal dismissed.

(1) I. L. R. 14 Cal. 801 (1887).
(2) I. L. R. 33 Cal. 613 (1906).
(3) 10 C. W. N. 874: s. c. I. L. R. 33 Cal 1047 (1906).
(4) 17 C. W. N. 578 (1913).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 346 OF 1909.

STEPHEN, J.
MULLICK, J.
1913,
Heard, 26 and 27, May.
Judgment, 10, June.

NABIN CHANDRA SAHA & ors., Defendants, Appellants,
v
HEM CHANDRA RAY & anr., Plaintiffs, Respondents.

Hindu Law—Decree against Hindu widow and next reversioner in respect of obligation personal to widow, if binds reversion—Mortgage by widow and next reversioner, if binds reversion

A sale of property inherited by a Hindu woman in execution of a decree for costs obtained against her personally does not bind the reversioners.

JUGAL KISHORE v. JOTINDRA MOHAN (1), *followed.*

(1) I. L. R. 10 Cal. 985 at p. 991 (1884).

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The fact that the decree was obtained against her and the next reversionary heir jointly does not give the purchaser anything more than the qualified interest of the woman.

A mortgage of a portion of the inheritance in the hands of a Hindu woman executed by her jointly with the next reversioner does not necessarily bind the reversionary interest. It merely raises a presumption that the mortgage was entered into for legal necessity.

DEBI PROSAD v. GOLAP BHAGAT (2), *referred to.*

This was an appeal preferred on the 8th of March 1909 against a decree of Mr. A. H. Cumming, District Judge of Zilla Tipperah, dated the 8th December 1908, modifying a decree of Babu Hari Lal Mukerjee, Subordinate Judge of Tipperah, dated the 2nd October 1907.

The material facts will appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Harendra Narayan Mitra* for the Appellants.

Babus Tara Kishore Chaudhuri and *Sasadhar Ray* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

In this case the Plaintiffs sued for the recovery of eight annas share in some land as the heirs of their uncle Sarada Churn after the death of their grandmother Siba Sundari who acquired the estate of a Hindu widow in the property in question after Sarada's death. They succeeded in the first Court, but on appeal the suit was partly decreed and partly dismissed. In a second appeal, in which some of the Defendants are Appellants, three points have been raised, and it is not necessary to recapitulate more of the facts of the case, which have already been very fully dealt with, than are necessary for the determination of those points.

The first arises as follows: After Sarada's death, Siba Sundari his mother, and Gobinda, his brother, the father of the Plaintiffs, were each entitled to an eight annas share of the property, the whole of which was registered in the name of Siba Sundari and was managed by Gobinda. In these circumstances, a *kobala* was executed of Gobinda's share in favour of the Defendants, but in the name of Gobinda and Siba Sundari, who, however, refused to admit their execution when the Defendants attempted to procure registration. A decree was obtained in a suit brought to enforce registration, and in execution of an order for costs contained in the decree two lots of the property now in suit were sold and purchased by the Defendants. The question we have to decide is whether the interests of the Plaintiffs as heirs to Sarada passed under that sale. Both the Courts below have held that they did not : and we agree in that finding. It may be that there is no difference between a case like the present, where an order for costs is executed, and one in which the execution is to effect a relief granted like the delivery of possession, but it is impossible to escape the conclusion that the general rule laid down by the Privy Council in *Jugal Kishore* v. *Jotindra Mohan* (1) applies. "If the suit is merely for a personal claim against the widow, then merely the widow's qualified interest is sold, and the reversionary interest is not bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate

(2) 17 C. W. N. 701 (1913).

(1) I. L. R. 10 Cal. 985 at p. 991 (1884).

NABIN CHANDRA SAHA v. HEM CHANDRA RAY.

passes." The Subordinate Judge has discussed the nature of the suit in which the execution proceedings took place very fully, and came to the conclusion that, as far as Siba Sundari's eight annas share was concerned, nothing more passed in the sale than her Hindu widow's interest. The District Judge agreed with him, and taking the question to be one of mixed law and fact, we find that this decision is right. It has been suggested that as Gobinda was the person next entitled to enjoy Siba Sundari's property after her death, an execution levied against her and him could pass the whole estate. But we are not aware of any authority for saying that an involuntary alienation, as in an execution, is equivalent to a voluntary grant: and the argument put forward seems inconsistent with the principles laid down in *Debi Prosad* v. *Golap Bhagat* (2), and with the decision in *Mohim Chandra* v. *Kashi Kant* (3).

The second point is that certain sales in execution of rent decrees under which the Defendants claim a right to the entire interest in the property in question were valid. The sale took place after the sale by Siba Sundari and Gobinda, and, were, it is suggested, effected in order to give a better title to the Defendants. Both the lower Courts have held them to be fraudulent and collusive. Under the circumstances of the case, fully set out by the Subordinate Judge, we must accept this as a finding of fact.

The third point made by the Appellants is that set out in the 10th issue in the first Court, and is that Siba Sundari and Gobinda mortgaged portions of the disputed properties to Kumudamoyee Chaudhrain, to Kumar Chandra Talapatra, and to Madan Mohan and Nobin Chandra Saha. Bholanath, Defendant No. 12, paid the mortgage debts, as also certain sums due for rent and the costs of settlement proceedings. There is, therefore, a lien on the disputed properties for those payments by Bholanath, and for the debt due under the mortgage to Madan Mohan and Nobin Chandra. The Subordinate Judge has disposed of these claims by finding that the debt to Kumudamoyee was paid, and a mortgage contracted by Siba Sundari and Gobinda paid off by Bholanath, but that as the debt was contracted *pendente lite*, it cannot bind the estate. The same is held to be the case with the mortgage to Kumar Talapatra, where it is held that the money was paid by all the Appellants. The payment in respect of Nabin Chandra and Madan Mohan's mortgage he holds to be collusive. He also finds reasons founded in fact for holding that the smaller sums paid for arrears of rent and the cost of settlement are not recoverable from the Respondents. He comes to no finding on the question of the existence of any lien under the mortgage. All these findings seem to be accepted by the lower Appellate Court, though this is not done specifically, as it should have been. He, however, goes into the question of the effect of the mortgage last referred to and finds that the purpose for which the money was borrowed is not clear, but that as the mortgage was contracted by a Hindu widow and a reversioner, it bound the reversion as much as it would have done, had it been entered into by a full owner. For this finding, he relies on the decision in *Raj Bullubh* v. *Oomesh Chandra* (4), but this case must now be taken as superseded by *Debi Prosad* v. *Golap Bhagat* (2), referred to above, according to which the concurrence of the reversioner with the Hindu widow

(2) 17 C. W. N. 701 (1913).
(3) 2 C. W. N. 161 (1897).

(2) 17 C. W. N 701 (1913).
(4) I. L. R. 5 Cal 44 (1879).

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could not, in the present case, do more than raise a presumption that the mortgage was entered into under necessity. The lower Court has, however, decided this point in favour of the Plaintiffs decreeing the suit, but putting the Plaintiffs into possession of the land in dispute subject to the mortgage of Rs. 2,000.

The Appellant in this appeal therefore fails, and the appeal is dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1914 OF 1908.

D. CHATTERJEE, J. and BEACHCROFT, J. 1914, Heard, 27, July. Judgment, 17, August.

RAGHUNATH SINGH and another, Plaintiffs, Appellants, *v.* MR. WILLIAM COX and others, Defendants, Respondents.

Bengal Tenancy Act (VIII o 1885), secs. 86 (6), 88—Surrender of holding without the consent of mortgagee o portion of holding—Suit to eject mortgagee after settlement o remaining land with another—Subdivision of holding.

The provision of sec. 86 (6) of the Bengal Tenancy Act embodies within certain bounds the principle that the lessee has no power to effect by surrender anything he could not do by assignment to a third person.

WALTER *v.* YALDEN (5) *referred to.*

A surrender of a raiyati holding by the raiyat, without the consent of a usufructuary mortgagee of a portion of the holding, does not entitle the landlord to eject the mortgagee, and where the landlord after such surrender himself settled the rest of the land with another, the subdivision of the holding was effected by the landlord and so did not offend against sec. 88.

(5) (1902) L. R. 2 K. B. 804.

This was an appeal preferred on the 25th August 1908 against a decree of D. H. Kingsford, Esq., District Judge of Zilla Muzaffarpur, dated the 3rd July 1908, reversing a decree of Babu Ashutosh Ghosh, Munsif of Matihari, dated 27th December 1907.

The material facts will appear from the judgment.

Dr. Dwarkanath Mitter for the Appellants.

Babu Sarashi Ch. Mitter for the Respondents.

The JUDGMENT OF THE COURT was delivered by

CHATTERJEE, J. (BEACHCROFT, J. concurring).—The Defendant No. 1 had an occupancy holding which was not transferable by local custom or usage. He gave an usufructuary lease of a portion of this holding to the Plaintiff by a registered document and made an express covenant not to surrender his *jote* to the landlord. In breach of this covenant, however, he surrendered his *jote* to the landlords who dispossessed the Plaintiff and settled the remaining portion of the *jote* with a relation of Defendant No. 1. The Plaintiff sued for recovery of possession with mesne profits.

The Court of first instance gave a decree to the Plaintiff holding that the surrender was collusive. The learned District Judge has dismissed the suit holding that no collusion was made out.

It is contended in second appeal before us that even if no fraud or collusion is made out, the Plaintiff is entitled to succeed as the surrender made without his consent is not valid and cannot deprive him of his rights. Reliance is placed on sec. 86 (6) of the Bengal Tenancy Act which provides " that when a holding is subject to an incumbrance secured by a register-

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ed instrument the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer." The learned Vakil for the Respondents on the other hand contends that this sub-section applies only where the whole holding is under an incumbrance and could not have been intended to apply to a case like the present in which a part only of the holding is incumbered. He further contends that such a construction of sec. 86 (6) would offend against the express provisions of sec. 88 which provides that no division of holding will be binding upon the landlord unless it is made with his consent. He relies on the cases of *Rajendra Kishore* v. *Chandra Nath* (1), *Gagan Chandra Choudhuri* v. *Alak Chand Saha* (2), *Krishna Chandra Dutt Choudhuri* v. *Miran Bajania* (3). I think, the contention of the Appellant is sound and ought to be allowed; the incumbrance here is by a registered document and the surrender was without the consent of the Plaintiff. The surrender is therefore invalid.

As regards the arguments addressed on behalf of the Respondents, I do not see how an incumbrance upon a part of a holding is not an incumbrance on the whole. A burden upon a part of a holding is a burden upon the holding taken as an undivided whole. Nor do I see how the Appellant's construction of sec. 86 (6) offends against the provisions or the principle of sec. 88. It is true, the landlords have, after the surrender, settled the part not covered by the Plaintiffs' *zurpeshgi* with a third person and the effect is a divison of the holding; this division, however, is one made by the landlords themselves by treating the unencumbered portion as a separate entirety and assessing a separate rent upon it.

(1) 12 C. W. N. 878 (1907).
(2) 17 C. W. N. 698 (1913).
(3) 8 C. L. J. 222 (1908).

The cases relied upon do not help the Respondents. The case of *Rajendra Kishore* v. *Chandranath* (1) was a case in which it was held that there was abandonment by the tenant. The case of *Gagan Chandra Choudhuri* v. *Alak Chand Saha* (2) was one of the surrender of a part of a holding, and sec. 86 (6) was not referred to in that case. In the case of *Krishna Chandra Dutt Choudhuri* (3), the usufructuary mortgage of the entire holding for an indefinite time was held to be in breach of the conditions on which the tenant held his land. None of these cases decided any question under sec. 86 (6). There is on the other hand an express decision of this Court in the case of *Hasani Bibi* v. *Sadir Mahmud Sarkar* (4) in favour of the Appellant. On general principles also, I think, the Respondents have no reason to complain. In the case of *Walter* v. *Yalden* (5), Mr. Justice Channel lays down the law on this subject in England thus: ' The law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment. If the lessee has created under-leases the under-leases remain notwithstanding the surrender; the lessee cannot assign his term to any one else so as to put an end to those under-leases. But that, I think, is only an example of what he can and cannot do; the point is that he has no power to effect by surrender anything that he could not do by assignment to a third person: the reason being that he cannot convey to his landlord any more than to any one else anything that he has not got

(1) 12 C. W. N. 878 (1907).
(2) 17 C. W. N. 698 (1913).
(3) 8 C. L. J. 222 (1913).
(4) 2nd App. No. 2955 of 1911. Unreported.
(5) [1902] L. R. 2 K. B 304.

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himself." Sec. 86 (6) of the Bengal Tenancy Act embodies the same principle within certain bounds, and is quite consistent with justice, equity and good conscience. It was intended, no doubt, to prevent fraud and collusion, and no fraud or collusion of the landlord is proved in this case, but the conduct of the tenant was certainly fraudulent and in violation of his express contract not to surrender, and I have no hesitation in decreeing this appeal with costs.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 609 to 633 & 635 OF 1911.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 9, May.
1914,
Judgment,
1, June.

UMA CHARAN MANDAL and ors., Defendants, Appellants,
v.
MIDNAPORE ZEMINDARY Co., Plaintiffs, Respondents.

Fictitious rent-sale—Collusive sale arranged between **putnidar** ***and tenure-holder to get rid of under-tenure—Fraud—Abuse of process—Duty of tenure-holder to protect under-tenure-holders from paramount claims—Transaction, a private sale.***

Where a tenure-holder having offered to sell his interest to the putnidar, *the latter agreed to pay the price asked only if the tenure was rid of the interest of subordinate tenure-holders, and it was arranged that the tenure-holder would make default in paying rent, and that the* putnidar *would sue him for arrears of rent and put up the tenure for sale in execution of the decree and that a person who had no intention of buying the property would be made to bid up to a figure approaching the price settled, which thereupon would be offered by the* putnidar, *and the sale was effected as arranged:*

Held—*That the transaction should be vieved as a private sale which in fact it was, the form only of a Court sale having been gone through and abused with the object of defrauding the under-tenure-holders.*

A suit by the purchaser putnidar *to annul an under-tenure and to recover possession must therefore fail.*

These were appeals from a decision of J. C. K. Peterson, Esq., District Judge, Manbhum, dated 30th September 1910, affirming that of Babu Advaita Prosad De, Subordinate Judge, Purulia, dated 21st March 1910.

The facts of the case fully appear from the judgment.

Mr. S. P. Sinha, Babus Khetra Mohun Sen, Biraj Mohun Mojumdar, Panchanan Ghosh and *Dr. Dwarkanath Mitter* for the Appellants.

Dr. Rash Behary Ghosh, Babus Jogesh Chandra Roy and *Sitaram Banerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

S. A. No. 609 of 1911:—

This is an appeal by the Defendants in a suit for annulment of an under-tenure, and for possession thereof by a purchaser at a sale in execution of a decree for arrears of rent under the Bengal Sales of Under-tenures Act of 1865. The circumstances under which the sale took place may be briefly narrated. The Plaintiffs Company are the successors-in-interest of Robert Watson & Co., who obtained on the 8th March 1885 a *putni taluk* in Barahâbhoom from Raja Brojo Kishore Singh Deo, the then zamindar. Under the *putni* there was a tenure, originally held by one Sarupganjan Sinha, which had subsequently passed into the hands of Raja Jagabandhu Singh. The Defendants are in occupation of the disputed lands as

under-tenure-holders under the latter. The tenure-holder made default in payment of rent, with the result that the company, as *putnidars*, brought a suit against him for arrears and obtained a decree. At the sale which was held in execution of the decree, the company became the purchasers of the defaulting tenure on the 7th December 1908. The sale was confirmed on the 16th December 1908, and the company commenced this action, on the 28th May 1909, for recovery of possession on declaration that the under-tenure held by the Defendants had been extinguished as the result of the rent-sale. The Defendants resisted the claim substantially on two grounds, namely, *first*, that the Plaintiffs were not the purchasers of an entire tenure sold for its own arrears and were consequently not entitled to treat the under-tenure as cancelled under sec. 16 of Act VIII of 1865 (B. C.); and, *secondly*, that the sale had been brought about and accomplished under circumstances which made it in essence a private sale and disentitled the purchaser to claim the privileges accorded by law to a purchaser of an entire tenure at a real sale held under the provisions of the Bengal Rent Law. The first of these grounds raises a question of considerable nicety by no means free from difficulty, namely, did Sarupganjan Sinha hold one or two tenures and what was the legal effect of the deed of compromise, dated the 6th March 1881, on his title? But it is not necessary to examine this aspect of the matter, because the Appellants are entitled, in our opinion, to succeed in their second contention.

The District Judge has in concurrence with the Subordinate Judge found that the tenure-holder Raja Jagabandhu Singh was determined to get rid of the property and was anxious to make the best possible bargain for it. The company were ready to take the property by private purchase for Rs. 36,000; this was not acceptable to the Raja who had fixed the minimum price at Rs. 40,000. This the company would not pay, unless they could get a clear title by purchase at the rent sale, that is, a title free from the incumbrances of the under-tenure-holders. It was finally agreed on the day of sale that the company should bid up to Rs. 40,000, and that the Raja should allow the sale to proceed, although he was well able to save the property from sale by deposit of the small sum of Rs. 200 for which the rent-decree had been made. It was also arranged that at the sale, a pleader of the Court, Babu Satis Chandra Singh, should offer bids up to Rs. 39,000 so as to lead up to the pre-arranged bid of Rs. 40,000, on behalf of the company. The bid by Satis Chandra Singh was wholly fictitious; he never intended to buy the property, but offered the bid of Rs. 39,000 so that the company might at once follow up with a bid for Rs. 40,000. The arrangement as made antecedent to the sale was carried out in every detail, and the company became the purchasers of the tenure at the sale. The question arises, whether in the events which have happened, they are entitled to claim the privileges of a purchaser at a rent-sale, or whether they are not in the position of private purchasers of the property.

The principles applicable to cases of this description have been laid down in cases of the highest authority. In *Sree Nath Ghosh v. Hurnath Dutt* (1), this Court was called upon to consider the effect of a sale of a tenure under the Rent Law, brought about designedly to get rid of an underlessee. There the tenure-holder had deliberately defaulted to pay the superior land-

(1) 18 W. R. 240 (1872).

lord his just dues, with the intention that a decree might be obtained against him and his tenures sold so that the under-tenure might be extinguished. The plan succeeded, the decree was made and was executed. The purchase was settled from before the sale and the price also was fixed beforehand. Under these circumstances, the Court held that although the sale was held under the provisions of the Rent Law, it had no higher effect than a private alienation, because it was in essence a transfer under pre-arranged conditions to a purchaser who was a party to the arrangement. Mr. Justice Markby accepted the principle recognised in *Graham* v. *Allsop* (2) that an intermediate landlord is bound to protect his own tenant from all paramount claims, and held that he may be deemed to have committed an act of fraud against this under-lessee when he entered into an agreement with another person to get rid of an unrecorded co-sharer in the forced and fictitious sale for arrears of rent. The same principle was applied in the case of *Kishore Chunder Sein* v. *Kally Kinkar Paul* (3) where default was wilfully made by the record tenant and the tenure sold to a pre-arranged purchaser with a view to get rid of an unrecorded co-sharer in the property. The Court held that as the sale was not in essence a public sale, but only a device to give to what was really a private transaction the incidents of a public sale, it must be treated as a private sale only. It is worthy of note that in the cases of *Sree Nath Ghosh* v. *Hurnath Dutt* (1) and *Kishore Chunder* v. *Kally Kinkar* (3), this Court merely applied the doctrine laid down by their Lordships of the Judicial Committee in *Nawab Sidhee Nuzur Ally* v. *Ojoodhyaram Khan* (4), where an attempt was made to destroy the rights of a mortgagee by recourse to the device of a sale for arrears of revenue, at which the purchase was to be made by a purchaser with whom the terms had been settled in advance. It was held that the Court will strip off all disguises from a case of this character, look at the transaction as it really is and treat the sale as a private sale, because it was a mere device for the achievement of an ulterior purpose and never really meant to be a sale under the revenue laws for realisation of arrears of revenue. Whatever may be the forms gone through, no one will be allowed, by means of a fictitious auction sale, to cause loss to another and benefit to himself. The same principle was recently applied in the case of *Harendralal* v. *Salimulla* (5), where an attempt was made to destroy the rights of under-tenure-holders by means of a sale for arrears of revenue; the proprietor wilfully defaulted to pay the Government revenue, and arranged to have the property purchased by a person with whom all the terms were carefully pre-arranged and who agreed on those terms to offer bids at the sale which would inevitably follow the default. An analogous principle has been applied in the cases of *Harendralal* v. *Purna Chandra* (6), *Ram Prasad* v. *Pawan Singh* (7), *Janki* v. *Debi* (8) and *Faizur Rahman* v. *Mimansa Khatan* (9). In the case before us, the default was wilfully made; the sale was deliberately brought about, though the judgment-debtor was able to pay the judgment-debt; the purchasers and the price to be paid by them were settled in advance; here we have all the characteristics of a private sale. It

(1) 18 W. R. 240 1872).
(2) [1848] 3 Exch. 186 ; 77 R. R. 592.
(3) 20 W. R. 333 (1873).
(4) 10 M. I. A 540 (1866).
(5) 12 C. L. J. 336 (1910).
(6) 15 C. L. J. 132 (1910).
(7) 18 C. L. J. 97 (1907).
(8) 15 C. W. N. 776 (1910).
(9) 18 C. L. J. 111 : s. c. 17 C. W. N. 1283 (1913).

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was clearly an abuse of statutory provisions for sale of tenures in execution of decrees for rent, to bring about designedly a sale under such circumstances, so that the rights of under-tenure-holders might be destroyed, an unincumbered title conveyed to the purchaser, and the maximum of benefit conferred upon the defaulter. The transaction in all its characteristics was a private sale, and if we were to regard it as a real rent-sale, we would have to hold that an unscrupulous tenure-holder may successfully avail himself of the stringent provisions of the Rent Law, solely with a view to injure subordinate tenure-holders and to profit by their detriment, while providing, by means of a secret arrangement with the intending purchaser, ample safeguards against any possible loss to himself by the transaction. The conclusion appears to be irresistible that the Plaintiffs must be treated as in no better position than purchasers by a private transfer. In this view, their claim for annulment of the under-tenure of the Defendants cannot be sustained.

The result is that this appeal is allowed and the suit dismissed with costs in all the Courts.

S. A.'s Nos. 610 to 633 and 635 of 1911 :—

It is conceded that the above judgment will govern these appeals. They will consequently be allowed, and the suits from which they arise will stand dismissed with costs throughout.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1274 OF 1914.

SHARFUDDIN, J.
TEUNON, J.
1914,
Heard, 2 and 3, September.
Judgment, 7, September.

H. MEREDITH, Accused, Petitioner,
v.
SANJIBANI DASI, Complainant, Opposite Party.

Writ of possession, execution of—Justifiable degree of force in delivering possession—Indian Penal Code (Act XLV of 1860), sec. 323—Hurt—Finding, what amounts to—Disbelieving witnesses as regards graver charges against accused and believing them with regard to rest, propriety of—Letter sent by Complainant to police station before lodging complaint, admissibility of.

The Petitioner, a Bailiff of the Small Cause Court, Calcutta, was entrusted with the execution of a writ of possession which required and authorised him to "give possession" to the decree-holder of certain premises in the occupation of the judgment-debtor. On the complaint of the judgment-debtor's wife, the Petitioner was placed on his trial on the allegation that he caught hold of her by the hand, forcibly dragged her out of the house and pushed her and when, in consequence of the push, she fell, the Petitioner kicked her. Some time after the occurrence, the Complainant sent through her husband a letter of complaint to the thana and subsequently a complaint made either by the Complainant or her husband was lodged against the Petitioner at the thana. The Magistrate in convicting the Petitioner under sec. 323, I. P. C., found that in pulling or dragging the Complainant out of the house, he pushed or jerked her from him in such a manner as to cause her to fall and to receive the injuries found on her elbows and knee. He further found that the Petitioner did not deliberately kick the Complainant, but nevertheless held as follows: "I think it quite possible

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that on seeing her fall, he went up to ascertain what had happened to her and pushed her more than once with his foot to make her rise."

Held (*without deciding whether the provisions of the English Common Law or the Code of Civil Procedure were applicable to the writ in question*)—*That under the provisions of either law in the execution of a writ of possession, a reasonable degree of force may be used in order to effect the removal of persons bound by the decree and refusing to vacate.*

That on the Magistrate's own finding the Petitioner should not have been convicted.

That to say that a thing may possibly have happened is not to find that it did happen, and there was no finding by the Magistrate that after the Complainant had fallen, the Petitioner touched or pushed her with his foot.

That the Magistrate should not have relied on the letter sent by the Complainant to the thana previous to the lodging of the complaint.

That the witnesses having been disbelieved with regard to the graver charges brought against the Petitioner could not be safely believed with regard to the small residuum of what the Magistrate conceived to be truth.

This was a Rule granted on the 24th July 1914 against an order of D. Swinhoe, Esq., Chief Presidency Magistrate of Calcutta, dated 20th May 1914, convicting the accused under sec. 323, I. P. C., and sentencing him to pay a fine of Rs. 50.

The material portion of the Magistrate's judgment is set out below.

"In this case, the accused Meredith, a Bailiff of the Small Cause Court, is charged under sec. 323, I. P. C., with having on the 31st January 1913 voluntarily caused hurt to the Complainant Sanjibani Dasi by dragging and throwing her down and kicking her at Jagannath Sur's Lane. This case was originally tried by the 2nd Presidency Magistrate, who acquitted the accused on 3rd May 1913.

"The order of the acquittal was subsequently set aside by the High Court and a re-trial ordered. It appears from the evidence that, about 4 P.M. on the 31st January 1913, accused received a warrant of possession, whereby he was directed to give possession of a portion of the premises No. 4 Jagannath Sur's Lane to one Kali Charan Pal, the brother of Purna Chandra Pal, the husband of the Complainant. The accused, accompanied by Kali Charan and one Bomswitch and others, proceeded to the house.

"The Complainant states that, she was cooking in the cook-room about 5 P.M. and her husband was in the *baitakhana*, when the accused, Bomswitch and the others arrived. They spoke to her husband Purna and then entered the cook-room and began to kick at the *handis*. Complainant began to cry and went out of the room with her little girl, and sat on the hedge of the room. The *sahib* then gave orders to the peon there to take the girl from the Complainant. The peon did so and took the girl outside the house. Thereupon the Complainant went into the *baitakhana* to see what had happened to the child. The accused then came into the *baitakhana* and seizing hold of the Complainant by the left hand, dragged her out into the street and threw her down and began to kick her. The other *sahib*, Bomswitch, also kicked her. She was kicked on the back ribs and buttocks. Her husband then came out of the house and picked her up and took her to the house of a neighbour Gusto Behary Bhur, who lived on the other side of the

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road opposite to Complainant. She says that about 7 or 7-30 P.M. her husband Purna wrote a letter of complaint (Ex. 1) to the Sub-Inspector of the Burtolla thana, wherein it was stated that, two Bailiffs of the Small Cause Court with the aid of a peon forcibly dragged her out by the hand from the rooms and threw her down and kicked her, in consequence of which she was in great pain all over her body and had marks. This letter, she says, she signed and sent to the thana by her husband. About 11 P.M. she went to the thana and showed the Inspector the marks of the injuries on her elbows and knee, which she had received at the hands of the accused. She made her complaint and the Sub-Inspector wrote something. The next morning she was examined by a doctor who gave her some mixture and something to rub. Later she came to this Court and lodged her complaint and showed her marks to the Magistrate. After which she went to the Small Cause Court and showed her marks to the Judge there.

"Purna Chandra Pal, Complainant's husband, corroborates Complainant as to the assault and other matters and states that accused was drunk when he came to the house, that the witness asked for 24 hours' time, but was refused. He then asked for two hours' time, so that they might finish their meal; this also was refused. He further states that, as his wife could only write her name, he wrote out the letter (Ex. 1) and made her sign it and took it to the Sub-Inspector who told witness to bring his wife, as he wished to see the marks on her person, whereupon he returned home and took his wife to the thana, where she informed the Sub-Inspector that she had marks, but did not show them.

"It is alleged by some of the prosecution witnesses that accused was drunk or under the influence of liquor. I have no doubt that after his exertions, the accused had a dishevelled appearance and a flushed face, which led the witness to conclude that he had been drinking. I do not however believe that he was drunk or under the influence of liquor. There is no doubt from the evidence that the letter of complaint (Ex. 1) was produced during the former trial. The prosecution alleges that it was produced at an early stage whereas the defence allege that it was produced at a very late stage of that trial. The defence contends that the story put forward by the prosecution of the writing and signing of the letter of complaint, the taking of it to the thana by Purna at the time stated and the visit to the thana at 11-40 P.M. by the Complainant is false. That during the former trial the 2nd Magistrate, on the 15th March 1913, examined the Thana Register and on seeing that the complaint had been entered at 11-45 P.M., remarked that it had not been lodged till very late. Thereupon the pleader for the prosecution explained that the Complainant being a *purdanashin* lady was reluctant to go to the thana. That in order to minimise the effect of this explanation of the delay in the making of the complaint, the Complainant Purna, the pleader, the Sub-Inspector and the other witnesses for the prosecution subsequently consulted together, concocted the story, fabricated the letter and caused the word *chithi* to be inserted in the Thana Register and the case number and date to be entered on the letter. This I do not believe. I have considered the evidence and the arguments put forward on both sides, and am of opinion that the prosecution story is substantially true. The defence further contends that the prosecution story as to the manner in which the Complainant was ejected is untrue. There can be no doubt that the accused experienced

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very considerable difficulty in ejecting the females from the house, especially the Complainant, and had to send 3 or 4 times to the thana to obtain police assistance to enable him to do so. It is not at all likely that after this opposition the Complainant who is a *purdanashin* would come quietly to the door with a crowd of strangers looking on and go out of the house as stated by the defence, and I do not believe that she did so. On a careful consideration of the evidence and the argument adduced by the both sides, I am of opinion that the accused had the Complainant's child taken out of the house in the hope that she would follow it quietly. Finding that she still refused or was reluctant to go out and his attempts to obtain police assistance was infructuous and that it was getting late, he became exasperated and pulled or dragged Complainant out of the house and pushed or jerked her from him in such a manner as to cause her to fall and receive the injuries on her elbows and knee and caused her bodily pain. I find accused guilty of the offence charged. I do not believe he deliberately kicked the Complainant when she was down. I think it quite possible that he, on seeing her fall, went up to ascertain what had happened to her and pushed her more than once with his foot to make her rise and this action of his was taken by the excited on-lookers as a deliberate kicking of the Complainant and led to the accused being assaulted by one of them. I convict the accused under sec. 323, I. P. C., and sentence him to pay a fine of rupees fifty, in default a fortnight's simple imprisonment".

The Advocate-General, with *Mr. P. L. Roy* and *Mr. J. W. Chippendale* for the Petitioner.

Babus Manmatha Nath Mukherjee, Heramba Ch. Guha and *Satindra Nath Mukherjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

In this case, the accused Petitioner, one H. Meredith, a Bailiff of the Small Cause Court, has been convicted under sec. 323 of the Indian Penal Code, and sentenced to pay a fine of Rs. 50.

It appears that at about 4 P.M. on the 31st of January 1913, he was entrusted with a writ or warrant (Ex. M) which required and authorised him to "give possession" to the decree-holder Kali Charan Pal of certain premises then in the occupation of the judgment-debtor Purna Chandra Pal. As the warrant was to be executed that very day, he forthwith proceeded on his errand, reached the premises (No. 1, Jagannath Sur's Lane) at or about 4-30 to 4-45, and, as he reported, on the 31st succeeded "after considerable difficulty" in giving vacant possession to the decree-holder at five minutes after 6.

At 11-45 P.M. a complaint was lodged against him and his companion one Bomswitch at the neighbouring thana. This complaint was made by the judgment-debtor Purna Chandra Pal, or by the judgment-debtor's wife one Sanjibani Dasi, and was summarised in the Thana "Daily Register of Cases" as follows:—

"Assault (*i.e.*, on Sanjibani), abrasion marks (*chila dag*) on both elbows, abrasion mark on right knee, and pain all over the body complained (or spoken) of: (she) does not want to go to hospital."

On the following day, the 1st of February, the woman Sanjibani presented a complaint before the Chief Presidency Magistrate. The complaint recites that when required by the Bailiffs (Bomswitch was then supposed to be a Bailiff or Assistant Bailiff) to leave, the husband represented that having had no previous notice he was not prepared to move out immediately, and prayed for 24 hours' time. It then proceeds to say

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that being thereby enraged, the two accused (1) threw out the household articles with the help of coolies, (2) broke the kitchen utensils and destroyed the food then under preparation, (3) had the Complainant's child removed from her arms and carried out by a peon; (4) that the accused Meredith next caught hold of her by the hand, forcibly dragged her out of the house, and pushed her, and (5) that, when (in consequence of the push) she fell, both accused kicked her.

The complaint next refers to a medical examination by a doctor, and a certificate furnished by him and also to an information "sent after some time to the local thana". It may be here observed that to the charges made in the complaint the husband and other prosecution witnesses at the trial added the further charge that at the time in question both accused were drunk.

The accused Meredith's defence is to be found in the report submitted to the clerk of the Small Cause Court on the 3rd. of February. It may conveniently be mentioned here that on the 1st of February Meredith had reported verbally to the clerk Mr. Nuttal and, on his orders, had submitted a written report which cannot now be found. That such a report was, however, submitted, is clear from the evidence of Nuttal and also from the evidence of Mr. J. G. Gupta, now an Additional Judge, and at that time Registrar of the Court. Mr. Gupta being of opinion that the report was lacking in detail, required the submission of a further report, and this order resulted in the submission of the report of the 3rd February (Ex. N). That the report of the 1st February should be missing is much to be regretted, but for present purposes it is sufficient to say that it does not appear that the accused Meredith is in any way responsible for the loss.

In the report of the 3rd February, the Bailiff states that the judgment-debtor did ask for time, that the decree-holder refused to listen, that while coolies were removing the household properties, a pleader, named K. D. Mitter, appeared, said that 24 hours' notice should have been given and directed the woman not to leave. The Bailiff proceeds to say that he then sent four messengers one after the other to the local thana for assistance, proceeded with the removal of the properties, and had a gharry fetched for the women of the house. On the arrival of the gharry, the Complainant went to the door, whereupon the Bailiff stepped behind her. He continues that at the instance of the pleader, already mentioned, first, the woman and then the judgment-debtor, her husband, tried to push past him, and that when he turned to shut the door he was struck two blows on the head from behind.

In the report no reference is made, it may be observed, to the incident of the child.

The case came on for trial before Mr. Keays, the 2nd Presidency Magistrate, who, on the 3rd of May 1913, delivered judgment acquitting the accused. For the purpose of completing this narrative, it may be mentioned that his findings were (1) that the allegation that the accused were drunk had no foundation in fact, (2) that the Bailiff sent at least three messengers to the local thana for assistance, (3) that the evidence regarding the alleged kicking could not be accepted, and (4) that he therefore could not act on the evidence to the effect that the accused Bailiff had given the Complainant a push. In fact he appears to have been of the opinion that the defence was true and that the trifling injuries sustained by the Complainant were sustained in her efforts to push her way into the house which she had left.

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Against Mr. Keays' order of acquittal, the Complainant moved this Court which on the 23rd of October set aside the order of acquittal as against Meredith and directed his re-trial mainly on the ground that the Trying Magistrate had not enquired into the authenticity of a certain letter of complaint (now marked Ex. 1) said to have been written by Purna, signed by Sanjibani, and taken to the thana by Purna at 7 to 7-30 on the evening in question.

The case against Meredith accordingly came on for re-trial before the Chief Presidency Magistrate Mr. Swinhoe, who, on the 20th of May 1914, delivered judgment convicting the accused and sentencing him as we have already stated.

Mr. Swinhoe's findings are to the effect—(1) that the prosecution story as to the letter (Ex. 1) is substantially true, (2) that the accused Bailiff was not drunk or under the influence of liquor, (3) that the Bailiff experienced considerable difficulty in ejecting the women of the house, more particularly the Complainant, and accordingly sent three or four messengers to the thana for assistance, (4) that in the hope of inducing the mother to go quietly, the Bailiff, first, had the child taken out, (5) that this device failing, he became exasperated and pulled or dragged the woman out of the house, and lastly (6) pushed or jerked her from him in such a manner as to cause her to fall and to receive the injuries found on her elbows and knee.

He further found that the accused did not deliberately kick the Complainant, but having come to this distinct finding he went on to say · "I think it *quite possible* that on seeing her fall he went up to ascertain what had happened to her and pushed her more than once with his foot to make her rise".

Against the conviction and sentence based on these findings, the accused moved this Court on the 24th July and being dissatisfied with the manner in which the case had been tried, we issued the present rule in order to our examination of the evidence and our consideration of the question whether the accused had in fact exceeded his lawful authority in the execution of the warrant entrusted to him.

We have now been taken over the whole of the evidence and have had the advantage of hearing the learned Advocate-General for the Petitioner, and Babu Manmatha Nath Mukerjee on behalf of the Complainant, Opposite Party.

The warrant of possession, it is to be premised, was one issued under the provisions of secs. 41 to 43 of the Presidency Small Cause Courts Act, XV of 1882, is in the English Common Law form, and "requires and authorises" the Bailiff "to give possession."

The contentions of the learned Advocate-General there are :—(1) That to the execution of this warrant in the Presidency town of Calcutta, the provisions of the English Common Law are applicable, (2) that on the refusal of the Complainant to vacate, the accused Bailiff was justified, and, indeed, in order to complete the execution of the warrant, was required to remove the Complainant from off the premises by the use of such force as might be found necessary, (3) that in dragging or pulling the Complainant out of the house and pushing or jerking her so as to cause her to fall, the Bailiff did not in fact use excessive or unnecessary violence, (4) that the passage in the judgment regarding the touch or push with the foot does not embody a finding, and lastly (5) that the more serious allegations of the prosecution having been disbelieved, no findings adverse to the Petitioner should have been arrived at.

On the other hand, on behalf of the Com-

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plainant, Opposite Party, it is contended—(1) that by reason of the provisions of sec. 48 of the Presidency Small Cause Courts Act, the provisions of the Code of Civil Procedure (that is, Or. XXI, r. 35) are applicable to a writ or warrant such as that now in question, (2) that by reason of the omission from the writ or warrant of the words "and you are hereby authorised to remove any person bound by the decree who may refuse to vacate the same", being the words used in warrant issued under Or. XXI, r. 35 (V form, para. 11, First Schedule, Appendix E), the accused Bailiff was not justified in using force, and on show of opposition or resistance should have proceeded in the manner indicated in Or. XXI, r. 97, (3) that in any view of the case in "pushing or jerking the Complainant from him in such a manner as to cause her to fall" and thereafter "in pushing her with his foot to make her rise", he used unnecessary and improper violence.

Whether the provisions of the English Common Law or of the Code of Civil Procedure are applicable to the writ or warrant now in question, need not, we think, be decided in the present case. Under the provisions of either law in the execution of a writ of possession, a reasonable degree of force may be used in order to the removal of persons bound by the decree and refusing to vacate. That the Complainant, a dependent of the judgment-debtor, and asserting no independent right to the premises, was bound by the decree, is not questioned. In a writ of possession issued under the English Common Law, words expressly authorising forcible removal are not inserted, bu it is settled law that the order to "give possession" authorises and requires the removal of all persons from off the premises by force if need be. In the Small Cause Court, it appears, this form is followed, and even if the Civil Procedure Code be applicable, the omission of the words expressly authorising removal is, in our opinion, immaterial. Or. XXI, r. 97, merely provides an additional or alternative remedy.

We are then unable to accede to the Complainant's contention that the Trying Magistrate has found as a fact that after the Complainant had fallen, the accused touched or pushed her with his foot. To say that a thing may possibly have happened is not to find that it did happen. The Magistrate who was evidently not prepared to come to a definite finding that the accused touched the Complainant with his foot, should have said so without ambiguity, and, should have omitted from the judgment what is mere conjecture.

We are then left with the finding that "on pulling or dragging the Complainant out, the accused pushed or jerked her from him in such a manner as to cause her to fall and receive the injuries found on her knee and elbows".

The Complainant having obstinately refused to leave, and the hour being late, it has not been contended before us that in pulling her out of the house by her hand, the Bailiff in the view of the law we have taken did more than he was justified in doing. But it is contended and no doubt properly contended that, the woman being once on the roadway, it was highly improper for the accused to proceed further to "push or jerk her" so as to cause her to fall. It is, however, not disputed that between the dragging and the so-called jerk there was no interval and that the whole represented one continuous act. In effect then it comes to this that when the accused let go his hold, the force used for the purpose of pulling out the resisting Complainant was sufficient to cause her to fall. In cases such as this it is impossible to calculate and apply with the utmost

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nicety the degree of force necessary and yet not more than sufficient. Even therefore, on the Magistrate's own findings, we think that the accused should not have been convicted.

But we should further say that we are not satisfied that the Magistrate's findings are correct. We need not discuss the evidence at great length, but we may observe that the Magistrate has accepted the prosecution story with regard to Ex. 1, the letter of complaint said to have been taken to the thana at 7 or 7-30. That letter is of importance mainly from the point of view of the charges of drunkenness and kicking, but the Magistrate's estimate of the value of this letter has doubtless largely coloured his view of the rest of the evidence.

We are of opinion that he should not have relied upon this letter. It is not referred to in the complaint of the 1st of February. It was not put to the prosecution witnesses in their examination-in-chief. It was mentioned for the first time on the 4th of April in a volunteered statement made by Purna during his cross-examination at the 8th hearing before Mr Keays and was not produced before the 10th hearing on the 10th of April.

In the thana case-register, there is no independent entry of the letter and of its receipt at 7 or 7-30. No doubt, in the "Thana Bengali Case Register" against the entry of Sanjibani's complaint at 11-45, in the column intended for the signature of Complainant, above the signature of Purna Chandra Pal, appears the word *chithi* (letter), but in the English Register submitted to the Deputy Commissioner at midnight, the entry in the corresponding column is merely a reference to the Bengali Register implying that the signature would there be found. There is no reference to any letter, though according to the correct practice, no doubt not invariably followed, the word *chithi* or letter should have been reproduced in the English Register. Moreover, the signature of Sanjibani on the letter is much more regular and more formed than that on the complaint, though in the agitation following upon the occurrences of the evening, the reverse was to be expected. No doubt the thana Sub-Inspector has supported the prosecution in respect of the letter, but it is to be observed that by reason of a stormy interview between him and Meredith, who went to the thana at about 6-30 to complain of the Sub-Inspector's failure to send assistance, the Sub-Inspector has obviously reasons for irritation against the accused, and it is on his evidence and on a belated entry relating to Meredith's visit that the discredited charge of drunkenness largely rests.

There has also been some controversy as to the medical certificate spoken to by the medical practitioner (L.M.S.) Phanindra Kumar Gupta. Such certificates, when filed with complaints in the Chief Presidency Magistrate's Court, it appears, are stamped and then returned for production at the trial. In the present case, the certificate (Ex. 3) was not produced at the trial before Mr. Keays until the 29th of March, and it is suggested that it is not the certificate first granted and referred to in the complaint. As however it is not disputed that there were scratches on the Complainant's elbows and one knee, the certificate is of importance only in so far as the reference therein to "contusions on the back and loins" (reduced in the doctor's deposition to an oval contusion an inch in size below the right shoulder) supports the discredited charge of kicking, we need not enter into this question. We may however take the opportunity of deprecating

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Contents.

NOTES.

The late Mr. Justice Carnduff.

It is with great regret that we have to announce the death of the Hon'ble Mr. Justice Carnduff. Mr. Justice Carnduff had passed his early days in India where his father was long connected with educational work. The late Judge was educated at Edinburgh and at Balliol College, Oxford, and also qualified himself as a Barrister-at-Law. He passed the Indian Civil Service Examination with distinction and after joining service in India gained a varied experience in various capacities in which he served the Government of Bengal and the Government of India. His experience in the Legislative Department of the Government of India and as the Registrar of the High Court served him in good stead as a judicial officer. He was very popular as a District and Sessions Judge. As Judicial Secretary to the Government of Bengal and Judicial Commissioner of Chota Nagpur he added to his claims and qualifications for being promoted to the Bench of the Calcutta High Court. He occupied a seat on the Bench for the last six years and was uniformly courteous to the members of the Bar. In recognition of his services Government conferred on him the honour of Knighthood. His premature death will be regretted by all.

THE CROWN AND TREASON TRIALS.

'It is of more consequence,' said Addington after the abortive trials for high treason in the revolutionary period of the latter part of the 18th century, 'to maintain the credit of a mild and unprejudiced administration of justice than even to convict a Jacobin.' And Sir Erskine May, commenting on the result of these trials as 'most fortunate', describes the sense of relief which was felt when the acquittal of the persons accused showed that, if the executive had been too easily alarmed, the administration of justice had not been interfered with, and that, even in the midst of panic, an English jury would see right done between the Crown and the meanest of its subjects. If, as was prognosticated, something of the full sense of responsibility has been removed from juries by the establishment of the Court of Criminal Appeal, it is satisfactory to find that the highest traditions of British Justice are preserved by that Court, and that, even under the greatest stress of national feeling, impartial treatment is accorded to the alien as well as to the native-born subject. Nothing could more redound to the credit of our administration of justice than the quashing of the conviction for high treason of the *ex*-German Consul of Sunderland by the Full Court of Appeal on the morrow of the inquest on the victims of the murderous attack on open towns in that district by vessels of his native State. But students of our history will find nothing to wonder at in this result, for since quite early times—at all events, for the last six centuries—it has been the object of our Legislature, as well as of our Judges, to ensure that, as treason is the highest crime, it should, therefore, be the most precisely ascertained, 'for if the crime of treason,' says Blackstone, 'were indeterminate, this alone would make any Government arbitrary.' It was for that reason, and to avoid all 'constructive' treasons, that the Treasons Act of 1351 (25 Edw. III, St. 5, Cap. 2) was passed defining what should in future constitute this capital crime. The Courts have always shown the greatest jealousy of all attempts by the Crown to make use of this weapon except for extreme cases of danger to the State, and the failure of Crown prosecutions for high treason is common in our legal history. It is entirely in accordance with our best legal traditions that the Court of Criminal Appeal should have refused to sup-

port a conviction based on a technical breach of the provisions of the Statute of Treasons forbidding the giving of aid or comfort to the King's enemies, and should have had regard rather to the 'intention and purpose' of the accused than to his bare acts in the execution of his duty as a Consul of the enemy State.—*The Law Journal.*

BELLIGERENT WAR-SHIPS IN NEUTRAL PORTS.

(Continued from page xlviii.)

(ii) Repairs of belligerent war-ships in neutral ports and roadsteads.

The rule regulating the repairs of belligerent war-vessels in neutral ports and roadsteads, like the last one, is the result of compromise. It runs thus: "In neutral ports and roadsteads belligerent war-ships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatever to their fighting force, etc. . . ." The rule does not draw any distinction between the damages caused to a belligerent war-vessel by accident or stress of weather and the injuries suffered by such vessels in battle. Accordingly both kinds of damages are allowed to be repaired in neutral ports so long as such repairs are necessary to make the vessel seaworthy, although at the Conference Great Britain and the United States of America very properly suggested that a neutral should not allow a belligerent war-ship in his ports to repair her damages caused in battle. The rule, it seems, further permits an extension of the usual 24 hours' stay, if necesasry, to damaged vessels for the effecting of repairs, irrespective of the cause of the damage. This certainly was a retrogressive step; for during the Russo-Japanese War the United States of America, China, France and Germany had refused an extension of the ordinary period of stay to disabled Russian vessels which entered their ports greatly in need of repairs, on the ground that the injuries were received in battle. The above practice at least ought to have been unanimously adopted by the Powers at the Conference. But here, as with the other rules, the ideal was sacrificed to national and political interests.

Some writers rightly urge that to make a war-vessel seaworthy is practically to restore it as a fighting unit and as such neutrals should not allow unseaworthy belligerent war-ships to repair their damages due either to accidents or engagements with the enemy. That would no doubt be in accordance with the strict conception of neutrality. But it is too high a standard to be expected to receive general acceptance now. Besides, owing to the exigencies of life at sea, some indulgence may be shown in cases of belligerent vessels damaged by accident and, as such, they may be allowed to repair their injuries in a neutral port, so as to make them seaworthy, within a reasonable period. But at the same time it ought to be laid down that a neutral should not allow belligerent vessels damaged in battle to repair their injuries in his ports. Such vessels when they enter the neutral ports should be dismantled and detained till the conclusion of the war. The question of extension of time cannot therefore arise in such a case.

(3) DURATION OF STAY OF BELLIGERENT VESSELS IN NEUTRAL HARBOUR.

The present rule on this point is that a belligerent war-ship may not prolong its stay in a neutral port beyond 24 hours or the time prescribed by the local law except on account of damage or stress of weather, in which case it must depart as soon as the cause of the delay is at an end. This rule evidently is a corollary to the other rules, and as such it will stand or fall with them.

It has already been shown how undesirable it is to grant asylum to belligerent war-ships entering neutral ports to escape attack, capture or destruction by the enemy or to repair the damages received in battle, and it has been suggested that such vessels should be allowed to remain in the neutral port only on condition of their being disarmed and detained till the conclusion of the war. It has further been submitted that if belligerent vessels enter neutral harbour on account of stress of weather or to repair accidental damages or to take coal (sufficient to carry them to their nearest home port), they may be allowed to enjoy neutral hospitality till their object is attained. Therefore in the light of the suggestions made before and now the question of duration of stay of belligerent war-ships in neutral ports can only arise when those vessels enter there owing to stress of weather or accidental damages or to take enough coal and provisions necessary to reach the nearest home port. It is suggested that vessels so circumstanced may be allowed to remain in the neutral harbour so long as it is absolutely necessary for them to be there—which may be 5 hours or 10 hours or two days according to the particular circumstances of the case. Therefore it would neither be necessary nor possible to fix

any time limit such as 24 hours or 36 hours, etc., for their stay. So it is clear that with the adoption of the suggested rules the 24-hours rule will prove nugatory.

From the point of view of the law as it now obtains the granting of asylum to the German battle-cruisers *Göeben* and *Breslau* by Turkey in her port was not illegal. But in strict conformity to her neutral duties, Turkey ought to have at the expiry of the usual time limit either ordered the vessels out or dismantled and detained them till the conclusion of the war, which unfortunately she did not. She went even further—she allowed these German cruisers, before she purchased them (the legal effects of which will be discussed under the next heading) to molest the merchantmen of the allies in her harbour and to conduct war-like operations against the Russian Black Sea ports in gross violation of the principles of neutrality. The allies would have been perfectly justified in declaring war on Turkey, but that was only deferred owing to their sincere desire to restrict the area of conflagration as far as possible. Besides, the settled and long-standing policy of Great Britain to maintain the *status quo* of Turkey partly in deference to the feelings of her Indian Moslem subjects and partly for political reasons was also an important factor in the postponement of the declaration of hostilities against Turkey. But the *pro*-German party in Turkey considered this a favourable opportunity to take up arms against Russia, her traditional foe, and France and England, the latter's present allies. Turkey may have some real or supposed grievances against England and France as well, but it must be admitted by all students of International Law, that she has had no *causes belli* against the allies in the present European conflict and that the allies have exercised the utmost forbearance to Turkey and have joined battle with her only under circumstances when they could not do otherwise consistently with their national self-respect and self-interest.

In conclusion it must be admitted that the rules of neutrality have been steadily developing for the last 200 years, till it seemed to be reaching maturity. Every succeeding International Conference has seen certain advance in the rules and thus a steady, if slow, progress towards a more clearly defined system of rules, is being made. But there is no doubt that many years of patient toil, sometimes through insurmountable difficulties, will yet be required of future Conferences before they can put in practice rules realising the strictest conception of neutrality. It is therefore sincerely hoped that in spite of their political jealousies, States will unflaggingly move onwards till the goal is reached.

The gross violations of International Law by Germany and the supreme contempt with which she has treated solemn International Treaties and Conventions may give rise to serious misgivings as to the binding force of International Law. It has no doubt given a rude shock to the mighty edifice of International Law which is being built up under the fostering care of civilised humanity since its foundation by Grotious. Moreover, one is inclined to think that the barbarities of the Germanic people, which necessitated the kindling of the light some 300 years ago and which has ever since served as a guide to the different States in their dealings with one another, may, by a curious irony of fate, be instrumental in extinguishing that light for ever. But such fears are groundless. International Law is based on the moral consciousness of communities which finds its expression in the civilised public opinion and that is strong enough to prevent the happening of such a catastrophe as the destruction of International Law. We are therefore confident that when the breakers of the sacred principles of the Law of Nations will be arraigned at the bar of humanity, it will justify its position as the supreme tribunal by passing a condign sentence and history will record it.

S. N. DUTT.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL.—Before THE LORD CHIEF JUSTICE and JUSTICES BRAY, AVORY, LUSH and ATKIN. *The King* v. *Isaac Schama* and *The King* v. *Jacob Abramovitch*. 30th November 1914.

Onus in a charge of receiving stolen goods where prisoner gives a reasonable explanation of his possession and which might be true Misdirection.

This was an appeal from a conviction on a charge of receiving stolen property, knowing it to have been stolen.

It was contended for the Appellants that there was a misdirection of the jury. The Court allowed the appeal, and THE LORD CHIEF JUSTICE said :—

It was clear that on a proper direction to the jury there was sufficient evidence on which they could, if they were so minded, convict the

Appellants of the offence with which they were charged. The real question was whether the Judge had given a proper direction. It was necessary to be very careful in dealing with this class of case, because in some of the cases which had come before that Court language which was not quite accurate had been used in stating the principle of law by which the jury must be guided. It was essential in such cases that there should be a careful and proper direction to the jury. In a case in which a charge was made against a person of being in possession of recently-stolen property, well knowing it to have been stolen, when the prosecution had proved that there had been recent possession of goods which had been stolen, the jury should then be told that they might, not must, in the absence of any explanation which might reasonably be true, find the prisoner guilty. But if a reasonable explanation had been given which might be true, then it was for the jury to say whether, on the whole of the evidence, they were satisfied that the prisoner was guilty. If the jury thought that the explanation which had been given might reasonably be true, although they were not convinced that it was true, the prisoner was entitled to be acquitted, because the Crown would have failed to discharge the onus imposed upon it by the law of satisfying the jury beyond reasonable doubt of the guilt of the prisoner. In such a case the burden of proof never changed; it always rested upon the prosecution.

The Court was not laying down any new principle, but was merely restating the law, and they hoped that such restatement might be of assistance to those who had to try cases of this kind. In the cases before them they were of opinion that there had been misdirection, and as they were unable to say that the jury must have come to the same conclusion at which they arrived, upon a proper direction in law, they must give effect to the view that there had been a misdirection and quash the convictions.

Messrs. Humphreys and *Purcell* for the Appellants.

Mr. Roome for the Crown.

B. D.

COURT OF APPEAL.—Before THE LORD CHIEF JUSTICE, THE MASTER OF THE ROLLS and LORDS JUSTICES BUCKLEY, KENNEDY, SWINFEN EADY, PHILLIMORE and PICKFORD. *Maxwell* v. *Grunhut*. 24th November 1914.

Action by an agent against his principal, an alien enemy, who could not sue, claiming a declaration that he was an agent and trustee—Maintainability.

The Plaintiff sued for a declaration that he was the manager and a trustee of the assets of a business carried on by the Defendant, an Austrian firm, in England, and for the appointment of a receiver of the assets of the said business, with liberty to pay the debts thereof. When the war broke out, the Defendant left England to serve in the Austrian Army, but before leaving he had furnished the Plaintiff with a full power-of-attorney to act on his behalf. It was submitted on behalf of the Plaintiff that the power-of-attorney was perfectly legal when it was created, and that it was not terminated by the subsequent declaration of war. The Plaintiff's object was to liquidate the business during the war, and to discharge liabilities.

MR. JUSTICE SCRUTTON rejected the Plaintiff's claim, and on appeal his order was affirmed.

THE LORD CHIEF JUSTICE said as follows :-

It was said that it would amount to the formation of a clearing house for the purpose of discharging the debts which would enable the agent to give a good discharge. To meet the difficulty the present action had been started. They had been told that all the debtors were ready and even anxious to pay their debts, but that they felt that they might in the circumstances not be able to obtain a proper discharge. The Plaintiff said that if the Court would make a declaration or make him receiver, he could collect the moneys due under the protection of the Court, and then there would be no difficulty in the matter. He (the Lord Chief Justice) desired to point out that at the outset there was this difficulty that in the opinion of the Court no such action as the present one would lie. Here the agent had brought an action against his principal and he claimed a declaration in respect of a duty owing by the agent to his principal, and not *vice versâ*. Such an action was quite novel, and no authority had been cited in support of it. It was quite impossible to sustain it, and it was obvious that the agent could have no greater right than his principal who, being an alien enemy, could not sue. In his judgment the claim put forward by the Plaintiff must be barred; the difficulties in the way were insuperable. He thought that Mr. Justice Scrutton was quite right in refusing to appoint a receiver and in saying that he had no jurisdiction.

Mr. Giveen appeared for the Plaintiff.

B. D.

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the return of such documents when once filed.

We may next observe that the Trying Magistrate has apparently overlooked the fact that a sanction for the prosecution of the witness Krishna Dhan Mitter had been granted by the Chief Judge of the Small Cause Court and that this witness and the other witnesses concerned in him cannot therefore be regarded as wholly disinterested.

Lastly, we have to say that the witnesses having been disbelieved with regard to the graver charges brought against the accused, for instance, the charges that he was drunk in the execution of his duty and that having thrown the woman down, he deliberately stamped upon and kicked her, we are of opinion that they cannot be safely believed with regard to the small residuum of what the Magistrate has conceived to be truth.

For these reasons, we make this rule absolute, acquit the Petitioner and direct that the fine, if paid, be refunded.

We might end our judgment here, but we are of opinion that in the public interests it is our duty to comment on the facts, brought to our notice in this case, in connection with the procedure followed both in the Small Cause Court and in the Courts of the Presidency Magistrates.

The arrangements which in the Small Cause Court permit of the disappearance of papers and do not permit of their being traced to some officer or person who can be held responsible must, in our opinion, be defective.

We have next to observe that in taking with him as an assistant one Bomswitch who, it appears, is not a Bailiff or Assistant Bailiff or other Court or Government officer, Meredith's conduct, if not permitted by the rules of the Court, was reprehensible. If permitted by the rules of the Court, the practice, if it be a practice, should we think be strictly forbidden.

Lastly, the evidence shows that in this case the writ of possession, to be executed on the 31st January, was not handed over to the Bailiff until at or about 4 P.M. of that day. The Bailiff, it appears, protested, but the clerk of the Court insisted upon immediate execution. It would seem to be obvious, that a writ of this nature, involving, in many cases as in this case, the ejectment without notice of persons in peaceful possession of their houses, should be put into execution at a much earlier hour. To do otherwise is unfair to the Bailiff, must necessarily cause much gratuitous hardship, and so bring the Court into disrepute.

Turning now to the Courts of the Presidency Magistrates, we have to say that we view with grave concern the procedure that has been followed in this case. In the Court of the 2nd Presidency Magistrate, the trial began on the 12th of March 1913 and did not close till the 3rd of May. In the course of this one month and 22 days, there were so many as 17 hearings for the examination of witnesses, on each occasion 1, 2, or at most 3 witnesses being examined or cross-examined either in whole or in part.

In the Court of the Chief Presidency Magistrate, the re-trial opened on the 5th December 1913, and judgment was not delivered until the 20th of May 1914. The trial then extended over a period of 5½ months, and in the course of the 5½ months, the case was put down for hearing on as many as 38 days. At 25 hearings, lasting on many occasions apparently for not more than 10 or 15 minutes, one or more witnesses were examined or cross-examined mostly only in part. Arguments similarly were spread over portions of six days.

H. MEREDITH v. SANJIBANI DASI.

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We are aware that the Presidency Magistrates have much to do, and it is possibly for this reason that the procedure we have illustrated has been adopted. We cannot however too strongly condemn this piecemeal method of dealing with cases. So far from economising time, by necessitating the preparation of an unnecessarily voluminous record, by giving to parties and witnesses opportunities for consultation and for the concoction and fabrication of evidence, and otherwise, the system must necessarily result in much waste of public time, while entailing upon parties intolerable inconvenience, loss of time and expense.

The procedure is further prejudicial to the course of justice inasmuch as the excessive and in many cases impossible cost involved must necessarily deter parties from seeking the best legal advice and assistance. Moreover, it impairs the value of the findings ultimately arrived at inasmuch as in a case dealt with in this manner and proceeding *pari passu* with a large number of cases similarly treated, it cannot be expected that when proceeding to judgment, the Magistrate will have that lively recollection of the evidence so essential to a just conclusion.

We trust, that the Presidency Magistrates will now abandon a procedure so calculated to bring odium upon their Courts and will so arrange their business as to enable them to set apart for lengthy cases certain specified days in each week. A trial once opened should then proceed throughout the day, and, as far as possible, from day to day until completed. If so dealt with, the present case, which is essentially a simple case of hurt, should have been disposed of and satisfactorily disposed of in two or at most three hearings.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD DUNEDIN.	JAMBU PARSHAD,
LORD SHAW.	Appellant,
SIR JOHN EDGE.	*v.*
MR. AMEER ALI	MUHAMMAD NAWAB
1914,	AFTAB ALI KHAN and
25, November.	anr., Respondents.

Registration Act (III o 1877), secs 32, 33—Mortgage-deed presented for registration by agent of mortgagee not authorised according to Statute in the presence of mortgagor—Admission o execution by mortgagor, if cures defect—Provisions, imperative.

A Registrar or Sub-Registrar under Act III of 1877 has no jurisdiction to register a document unless he is moved to do so by a person who has executed or claims under it, or by the representative or assign of such person or by an agent of such person, representative or assign duly authorised by a power-of-attorney executed and authenticated in manner prescribed in sec 33 of that Act.

Where the document is presented for registration by an agent not so authorised by the person in whose favour it has been executed, the executant who attends merely to admit that he has executed it cannot be treated for the purposes of sec. 32 of Act III of 1877 as presenting the deed for registration.

The terms of secs 32 and 33 of the Act are imperative. One object of those sections and secs. 34 and 35 of the Act was to make it difficult for persons to commit frauds by means of registration under the Act, and it is the duty of Courts in India not to allow the imperative provisions of the Act to be defeated when it is proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed by the Act to present it.

This is an appeal from a judgment of

JAMBU PARSHAD v. MUHAMMAD NAWAB AFTAB ALI KHAN.

the Allahabad High Court (Sir Henry Griffin and Chamier, JJ.), which is reported in I. L. R., 34 All., p. 331. The facts of the case sufficiently appear from their Lordships' judgment. The question for determination was whether a mortgage-deed was properly registered under the provisions of the Indian Registration Act, III of 1877, when the evidence on the record shewed that the person who presented the deed for registration was not properly authorised to do so in accordance with the provisions of sec. 32 of that Act.

The High Court held that the document was not registered. It concluded its judgment as follows :—

"The argument on behalf of the Appellant is in effect that it does not really matter by whom the document was presented for registration provided the executants appeared before the Sub-Registrar and admitted execution. The provisions of secs. 32 and 33 of the Registration Act, No. III of 1877, are not open to this lax interpretation. In *Mujibunnissa* v. *Abdul Rahim* (2), their Lordships of the Privy Council observed 'when the terms of sec. 32 are considered with due regard to the nature of registration of deeds, it is clear that the power and jurisdiction of the Registrar only come into play when he is invoked by some person having a direct relation to the deed.' In this case we have found that the mortgage-deed of 1882 was presented by Natthu Mall *a person who had no authority to present the document for registration.* In view of the observations of their Lordships of the Privy Council set out above, we are unable to hold that this initial defect, if it can be said to be merely a defect, can be held to be cured by the subsequent admission of execution by the executants. Nor can we hold that the provisions of sec. 87 of the Act can be invoked in aid of the validation of registration proceedings done in violation of the express provisions of secs. 32 and 33 of the Registration Act."

Hence this appeal.

Mr. L. DeGruyther, K. C. (with him *Mr. G. C. O'Gorman*), for the Appellant submitted that the documents had been registered in accordance with the provisions of the Act. Conceding that Natthu Mall was the person who presented the document for registration to the Sub-Registrar and that he was not an agent duly authorised by power-of-attorney to do so, the essential provisions of the Act were, nevertheless, complied with. The essential thing was not the presentation of a document, but its execution. The provisions of sec. 32 were directory and not mandatory. If the persons executing the deed admitted its execution, and the Sub-Registrar duly registered it, it was good registration, although it was presented for registration by a person not competent to do so. If a registering officer is satisfied that a certain document was properly presented before him, and he thereupon registers it in accordance with the provisions of secs. 34, 35, 58 and 59 of the Act, and endorses thereon a certificate required by sec. 60, then the certificate was conclusive that all the requirements of the Act were fully satisfied. The defect as to presentation was at its best a defect of procedure, and would not invalidate the registration of the document under sec. 87. By reason of the Registrar's certificate the document became a registered document. The case of *Mujibunnissa* v. *Abdul Rahim* (2) was clearly distinguishable. That was a case of a unilateral document where the principal had died when the document was

(2) L. R. 28 I A. 15 : s. c. I. L. R. 23 All. 233 (1900).

(2) L. R. 28 I A. 15 : s. c. I. L. R. 23 All. 233 (1900).

presented for registration and the authority of the agent had terminated with the death. It was true that the language of their Lordships' judgment was a little too wide, but the decision ought to be read in the light of the facts of that case. The only point there decided was that the document was not properly registered, and it was certainly not so registered because the principal had died, and it was only the representatives and assigns of the deceased that could have executed the document and given validity thereto. Reference was also made to *Sheo Shunkur Sahoy* v. *Hirdey Narain Sahu* (3), *Isak Mahamad* v. *Bai Khatija* (4), *Ishri Prasad* v. *Baijnath* (1), *Karta Kishan* v. *Harnam Chand* (5), *Atma Ram* v. *Ugra Sen* (6). Reliance was placed on *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (7) and *Mohammed Ewaz* v. *Birj Lall* (8). Further, it appeared that the mortgagors were present when the document was presented for registration and that very soon after presentation they admitted execution of the deed. It might be that they asked Natthu Mall to hand the document over to the Sub-Registrar, and in that case the presentation would be proper, but at the worst it was a trivial error of procedure which would have been rectified immediately if objection had been taken to it. After the lapse of such a long period of time it ought not to be held that the defect vitiated the whole transaction.

Mr. G. R. Lowndes for the Respondents submitted that the provisions of sec. 32 were mandatory, and that in default of proper presentation under that section

(1) I. L. R. 28 All. 707 (1906).
(3) I. L. R. 6 Cal. 25 (1879).
(4) I. L. R. 6 Bom. 96 (1881).
(5) I. L. R. 35 All. 72 (1912).
(6) I. L. R. 35 All. 134 (1912).
(7) L. R. 2 I. A. 210 (1875).
(8) L. R. 4 I. A. 166 (1877).

a document could not be said to be registered in accordance with the provisions of the Act under sec. 49. The Sub-Registrar had no jurisdiction to register the document, and the present case was concluded by their Lordships' judgment in the case of *Mujibunnissa* v. *Abdul Rahim* (2). Secs. 32 and 33 of the Act must be read together. Under sec. 60 the Registrar's certificate was not conclusive, it only renders it admissible for the purpose of proving that the document had been duly registered. Here the evidence afforded by the certificate had been rebutted by positive evidence. Since their Lordships' ruling in *Mujibunnissa* v. *Abdul Rahim* (2), the Registration Act had been re-enacted, but no change was made in the provisions of sec. 32.

Mr. L. DeGruyther in reply.—The new Act favours the Appellant's view, inasmuch as sec. 49 of that Act omits the words "in accordance with the provisions of this Act".

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—These are consolidated appeals from two decrees, dated the 13th February 1912, of the High Court of Judicature at Allahabad, one of which affirmed a decree of the Subordinate Judge of Saharanpur of the 26th September 1910, and the other of which partly affirmed and partly reversed a decree of the same Subordinate Judge of the 26th September 1910. The suits in which the decrees were made were brought in the Court of the Subordinate Judge of Saharanpur, one on the 20th May 1909 and the other on the 16th March 1910. They were suits for sale of immoveable property. The suit of 1909 was based

(2) L. R. 28 I. A. 15: s. c. I. L. R. 23 All. 233 (1900)

JAMBU PARSHAD *v.* MUHAMMAD NAWAB AFTAB ALI KHAN.

on a mortgage-deed of the 10th August 1886, the consideration for the mortgage having been Rs. 7,000. The suit of 1910 was based on a mortgage-deed of the 2nd July 1882, the consideration for that mortgage-deed having been Rs. 59,000, and upon a mortgage-deed of the 25th October 1892. There was in each suit a claim for a money-decree. The Subordinate Judge dismissed the suits on the grounds that the mortgage-deeds had not been validly registered, and consequently could not affect the immoveable property which was comprised in the mortgages, and that claims for money-decrees were time barred. On appeal to the High Court at Allahabad, the High Court dismissed the appeal in the suit of 1909, which was based on the mortgage of 1886, dismissed the appeal in the suit of 1910, so far as it related to the mortgage of 1882, and allowed the appeal in that suit so far as it related to the mortgage of 1892. These consolidated appeals are from the decrees of dismissal. The Plaintiff in the suits is the Appellant here. The Respondents have been Defendants in these suits, and one of them is the representative of a deceased Defendant.

The only questions, which have to be considered in these consolidated appeals, are, whether the mortgage-deed, dated the 2nd July 1882, and the mortgage-deed, dated the 10th August 1886, were validly registered under Act III of 1877. They were documents which were required by sec. 17 of Act III of 1877 to be registered. If they were not validly registered, they could not, by reason of sec. 49 of that Act, affect any immoveable property comprised in them, or be received as evidence of any transaction affecting such property. Further, if the documents of 1882 and 1886 were not validly registered instruments, no mortgage could, by reason of the first paragraph of sec. 59 of Act IV of 1882, be effected by them. They were in fact registered, but the question is—was the registration a valid registration? The Subordinate Judge and the High Court found that there was no valid registration in either case.

In sec. 32 of Act III of 1877 it is enacted that:—

"Except in the cases mentioned in sec. 31 and sec 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office,

by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or by the representative or assign of such person,

or by the agent of such person, representative or assign, duly authorised by power of attorney executed and authenticated in manner hereinafter mentioned."

So far as is material to the decision of these appeals, it is in sec. 33 of Act III of 1877 enacted:—

"For the purposes of sec 32 the powers-of-attorney next hereinafter mentioned shall alone be recognised (that is to say):—

"(*a*) If the principal at the time of executing the power of-attorney resides in any part of British India in which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the registrar or sub-registrar within whose district or sub district the principal resides."

The mortgage-deed of the 2nd July 1882 was presented for registration on the 11th July 1882 at Saharanpur at the proper registration office on behalf of Lala Mitter Sen, the mortgagee, by one Natthu Mall, who held a power-of-attorney, of the 19th June 1882, from Lala Mitter Sen, which, however, did not empower Natthu Mall to present documents for registration. Lala Mitter Sen lived at Saharanpur, and the power-of-attorney had been duly authenticated by the then Sub-Registrar of Saha-

ranpur on the 19th June 1882, but apparently it had not been executed before the Registrar or the Sub-Registrar. The Sub-Registrar's note to the copy of the power-of-attorney in the Register merely states that Lala Mitter Sen was known to him, and admitted the execution and completion of the document. It has not been proved that Natthu Mall held any other power-of-attorney from Lala Mitter Sen. The mortgagors admitted before the Sub-Registrar of Saharanpur, on the 11th July 1882, the execution and completion of the mortgage-deed, and received in his presence the mortgage money, Rs. 59,000, and thereupon the Sub-Registrar registered the mortgage-deed.

The mortgage-deed of the 10th August 1886 was presented for registration on the 9th September 1886 at Saharanpur, at the proper registration office, on behalf of Lala Mitter Sen, the mortgagee, by one Ilahi Bakhsh, who held a power-of-attorney of the 17th February 1885 from Lala Mitter Sen, which, however, did not empower Ilahi Bakhsh to present documents for registration. This power-of-attorney had not been authenticated by the Registrar or the Sub-Registrar of Saharanpur, and it does not appear that it had been executed by Lala Mitter Sen before either of those officials. It has not been proved that Ilahi Bakhsh held any other power-of-attorney from Lala Mitter Sen. The mortgagors admitted before the Sub-Registrar of Saharanpur, on the 9th September 1886, the execution and completion of the mortgage-deed of the 10th August 1886, and acknowledged the receipt by them of the mortgage-money, Rs. 7,000, and thereupon the Sub-Registrar registered the mortgage-deed.

It was contended on behalf of the Appellant here that it might be presumed, the mortgage-deeds had been presented for registration by the mortgagors who had executed the deed, and who attended before the Sub-Registrar. It is, however, obvious that the mortgagors had attended at the office of the Sub-Registrar to admit that they had executed the deeds and not to present them for registration, and that they did not present them for registration. The mortgagors attended to enable the Sub-Registrar to comply with secs. 34 and 35 of Act III of 1877 by satisfying himself that they had executed the deeds. In the one case the deed was presented for registration by Natthu Mall, an agent of the mortgagee, and in the other case the deed was presented for registration by Ilahi Bakhsh, another agent of the mortgagee, and in neither case did the agent hold such a power-of-attorney as was necessary to enable a valid registration to be made.

It was decided, and as their Lordships considered correctly, by Sir John Stanley, C. J., and Sir George Knox, J , in *Ishri Prasad* v. *Baijnath* (1) that the terms of secs. 32 and 33 of Act III of 1877 are imperative, and that a presentation of a document for registration by an agent, in that case the agent of a vendee of immoveable property who has not been duly authorised in accordance with those sections, does not give to the registering officer the indispensable foundation of his authority to register the document. As those learned Judges said :—

"His (the Sub-Registrar's) jurisdiction only comes into force if and when a document is presented to him in accordance with law."

These learned Judges also rightly decided in the same case that the fact that the Sub-Registrar had summoned before him the executant of the deed, who was the vendor, and had obtained his consent to the registration of the deed, did not give the Sub-Registrar jurisdiction to register it, and

(1) I. L. R. 28 All. 707 (1906.

that the omission of the registering officer to notice that the power-of-attorney under which the agent had presented the sale deed for registration had not been executed or authenticated in accordance with sec 33 of Act III of 1877 could not be regarded as a defect in procedure within the meaning of sec. 87 of that Act.

Although the facts in these consolidated appeals are not the same, as were the facts in *Mujibunnissa* v. *Abdul Rahim* (2), their Lordships consider that the principle which this Board applied in that case is applicable here. That principle, in their Lordships' opinion, is that a Registrar or Sub-Registrar under Act III of 1877 has no jurisdiction to register a document unless he is moved to do so by a person who has executed, or claims under, it, or by the representative or assign of such person, or by an agent of such person, representative or assign, duly authorised by a power-of-attorney executed and authenticated in manner prescribed in sec. 33 of that Act. It is obvious that executants of a deed who attend a Registrar or Sub-Registrar merely to admit that they have executed it cannot be treated, for the purposes of sec. 32 of Act III of 1877, as presenting the deed for registration. They no doubt would be assenting to the registration, but that would not be sufficient to give the Registrar jurisdiction.

One object of secs. 32, 33, 34 and 35 of Act III of 1877 was to make it difficult for persons to commit frauds by means of registration under the Act.

It is the duty of Courts in India not to allow the imperative provisions of the Act to be defeated when, as in this case, it is proved that an agent who presented a document for registiation had not been duly authorised in the manner prescribed by the Act to present it.

These appeals fail, and their Lordships will humbly advise His Majesty that the appeals should be dismissed. The Appellant must pay the costs of these appeals

Appeal dismissed.

(2) L. R. 28 I. A. 15 : s. c. I. L R. 23 All 233 (1900).

CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORDER

No. 200 OF 1912

COXE, J. D. CHATTERJEE, J. 1914, Heard, 2, February Judgment, 14, February.	CHRISTIANA SENS LAW, Appellant, *v.* BENARASHI PROSHAD CHOWDHURY, Respondent

Limitation Act (IX of 1908), Art 182, cl. (2)—Mortgage suit decreed against some Defendants and dismissed against others who were allowed costs against Plaintiff—Appeal by the Defendants against whom suit decreed, effect of, on application by the other Defendants or execution of decree for costs against Plaintiff.

The Appellant was the Plaintiff in a mortgage suit and obtained a decree except against two of the Defendants whose property was exempted from liability and whose costs the Plaintiff was directed to pay The Defendants against whom the suit was decreed appealed. The two other Defendants applied for execution of their decree for costs against the Appellant. The lower Court held that limitation ran from the date of the decision of the appeal preferred by the Defendants against whom the suit had been decreed :

Held—*That in dealing with the question of limitation in these cases, the Court should see whether the original decree was really one decree or an incorporation of several decrees and whether the appeal against it imperilled the whole decree or not, for the execution of which the application is made.*

CHRISTIANA SENS LAW *v.* BENARASHI PROSHAD CHOWDHURY.

That the order dismissing the Plaintiff's suit with costs as against two of the Defendants and the order decreeing it with costs as against the other Defendants were not one and the same decree, because they were embodied in one formal order. There was no appeal against the decree by which the Plaintiff was directed to pay costs to two of the Defendants and the fact that there was an appeal against an entirely different decree which was recorded in the same document did not affect the question of limitation when no order that could have been passed in that appeal could possibly have affected the decree sought to be executed.

This was an appeal preferred on the 29th April 1912 against an order of Babu S. N. Ghosh, Subordinate Judge of Monghyr, dated 30th March 1912.

The facts will appear from the judgment.

Moulvi Mahomed Ishfaq for the Appellant.

No one for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

COXE, J.—This appeal arises out of execution proceedings taken on a mortgage decree. The Plaintiff sued a number of Defendants on the mortgage and obtained a decree, except against Defendants Nos. 24 to 26. Their property was exempted from liability and the Plaintiff was directed to pay their costs, so that as against them, the Plaintiff's suit must be regarded as having been dismissed. Thereafter the other Defendants appealed. The Defendants Nos. 24 to 26 have now applied to execute their decree for costs, and the original Plaintiff pleads that the application is barred by limitation. The Subordinate Judge has held that limitation runs from the date of the decision of the appeal, and has allowed the application for execution. The original Plaintiff appeals.

The effect of an appeal by one party to a suit on the limitation of an application for execution against his co-parties has often been discussed, and has led to much diversity of opinion. It was held in *Hur Proshaud* v. *Enayet Hossein* (1) that, when the appeal does not imperil the whole decree, an appeal by one Defendant will not prevent limitation running against others. The head-note runs "where a decree for possession is made against three persons jointly, one of whom appeals against the decree only so far as it affects himself, and not against the whole decree, and the decree does not relate to property in respect to which the Defendants have a common interest and a common defence, so that an appeal by one would imperil the whole decree, then the fact of one Defendant's having appealed will not prevent limitation running, in favour of the others, against the execution of the decree." The learned Judges pointed out that in such a case, although the decree was drawn up in the form of a single order, it did in fact incorporate separate decrees. A very similar view was taken in the Full Bench case of *Wise* v. *Rajnarain Chuckerbutty* (2), but it must be conceded that the terms of the Statute (Act XIV of 1859) interpreted by that decision were very different to those of the subsequent Limitation Acts.

The view that the running of limitation in these cases depended on the question whether the appeal, which was relied on to save it, did or did not imperil the whole decree was accepted by the majority of the

(1) 2 C. L. R. 471 (1878).
(2) 10 B. L. R. 258 (1872).

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Full Bench in *Moshiatunnissa* v. *Rani* (3). Straight, J., observed : "In my opinion it was the duty of the Court, which was asked by the decree-holder to execute the decree, to see whether there had been an appeal, not by one or two Defendants simply assailing a part of the decree specifically and separately against them, but an appeal, which, though preferred by only two of the Defendants, assailed a decree which disposed of the suit on grounds common to themselves and the rest of the Defendants." And Tyrrell, J., observed that the cases in which it was decided that limitation ran from the date of the appellate decree were "cases in which the integrity of the decree was imperilled." And in this Court although the Judges have expressed the view that the terms of Art. 179 (now Art. 182), clause (2), should include all cases in which an appeal has been made by any party, yet their ultimate decision has always rested on the principle that the whole decree was imperilled by the appeal. I may refer to *Nundun Lal* v. *Joy Kishen* (4), *Kristo Churn* v. *Radha Churn* (5) and *Gopal Chunder* v. *Gosain das* (6). The last mentioned decision perhaps goes the farthest, but the original decree was a joint decree and an appeal against it, under the decision in *Hur Proshaud* v. *Enayet Hossain* (1), could not have saved limitation.

It seems to me that the present case shows the wisdom of adhering to the view taken in *Hur Proshaud* v. *Enayet Hossain* (1), that, in dealing with the question of limitation in these cases, we should see whether the original decree was really one decree or an incorporation of several decrees, and whether the appeal against it imperilled the whole decree or not. Evidently the words "where there has been an appeal" in Art. 182, clause 2, mean "where there has been an appeal against the decree or order for the execution of which the application is made." And it is surely impossible in this case to hold that the order dismissing the Plaintiff's suit with costs as against Defendants Nos. 24 to 26, and the order decreeing it with costs as against Defendants Nos. 1 to 23 are one and the same decree, because they are embodied in one formal order. The decree-holders are different and the judgment-debtors are different. The application before us is for the execution of the decree by which the Plaintiffs were directed to pay costs to Defendants Nos. 24 to 26. In my opinion, there has been no appeal against that decree and the fact that there has been an appeal against an entirely distinct decree, which was recorded in the same document, does not affect the question of limitation, when no order that could have been passed in that appeal could possibly have affected the decree which the Defendants Nos. 24 to 26 now seek to execute. I think therefore that the appeal should be allowed and the application for execution dismissed. As the Respondent has not appeared, I would allow the Appellant his costs of the Court below and half his costs in this Court.

D. CHATTERJEE, J.—I agree.

Appeal allowed.

(1) 2 C. L. R. 471 (1878).
(3) I. L. R. 13 All. 1 (1889).
(4) I. L. R. 16 Cal. 598 (1889).
(5) I. L. R. 19 Cal. 750 (1891).
(6) I. L. R. 25 Cal. 594 (1898).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3134 OF 1911.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
13, May.

BASER SHEIKH and others, Defendants, Appellants.
v.
FAZLE KARIM BISWAS and others, Plaintiffs, Respondents.

Appeal—Preliminary objection—Suit for possession of land by several Plaintiffs—Decree for joint possession—Failure to serve notice on some of the Plaintiffs-Respondents—Direction of Court dismissing appeal against them—Effect of such dismissal of the whole appeal.

Where in an appeal by the Defendants against a decree for joint possession of land passed in favour of five Plaintiffs there was a failure to serve notices of the appeal on two of the Plaintiffs-Respondents and the result was that the Court directed the appeal to be dismissed in so far as those two Plaintiffs were concerned, and the appeal came on for disposal against the remaining Plaintiffs-Respondents :

Held—*That the appeal could not proceed and it was accordingly dismissed.*

This was an appeal against a decision of Babu Chandra Bhusan Banerjea, Sub-Judge, Khulna, dated 5th June 1911, reversing that of Babu Surendra Krishna Ghose, Munsif, Bagerhat, dated 8th October 1909.

The material facts will appear from the judgment.

Babus Sasi Sekhar Bose and *Jogesh Chandra Bose* for the Appellants.

Babu Surendra Chandra Sen for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendants in a suit for posession of land. The decree is one for joint possession in favour of five Plaintiffs. All these Plaintiffs were joined as Respondents to the appeal. The Appellants however failed to serve notices of the appeal on two of them and the result was that the Court directed the appeal to be dismissed in so far as those two Plaintiffs-Respondents were concerned. The appeal has now come before us for disposal in so far as it is directed against the remaining three Plaintiffs-Respondents.

A preliminary objection has been taken that the appeal should not be heard; because as the decree was one for joint possession of land, whatever view may be taken by this Court on the merits, the entire decree can be executed by the two Plaintiffs against whom the appeal has been dismissed. In our opinion this objection is fatal and must be allowed. The view we take is supported by the decisions of t[illegible]s Court in the cases of *Bejoy Gopal Bo[illegible]* [illegible] *Umesh Chandra Bose* (1) and *T[illegible]* [illegible]*adar* v. *Khotejannessa* (2).

[illegible]s that the appeal is dismissed

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER No. 74 OF 1913 AND CIVIL RULE No. 221 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 18 and 19, March.
1914,
Judgment, 15, May.

MONIJAN BIBI & anr., Appellants, Petitioners,
v.
DISTRICT JUDGE, BIRBHUM, Opposite Party.

Guardians and Wards Act (VIII of 1890), secs. 24, 25, 26, 41 (1) (d), 43 (1), 47 (1)—Mahomedan infant—Guardian of person appointed by Court if supersedes guardian for marriage under Mahomedan Law—Function of Judge, not to select, but to sanction marriage—Appeal—Revision.

(1) 6 C. W. N. 196 (190[illegible]).
(2) 10 C. W. N. 981 (1906).

Nos.
their d[illegible]
Plaintiff
barred by

MONIJAN BIBI v. DISTRICT JUDGE, BIRBHUM.

A ward of Court cannot marry without the consent of the Court.

But it is not the function of the District Judge, acting under Act VIII of 1890, to act as a match-maker for the ward.

Sec. 24 of the Guardians and Wards Act does not by implication abrogate the rule of Mahomedan Law which assigns the function of guardianship in marriage of an infant to relatives who are not necessarily those entitled to the general care and direct custody of the person of the infant.

Under the Mahomedan Law it is not obligatory upon the guardian of the person, nor even upon the guardian for marriage, to provide a suitable marriage for the ward.

The proper procedure to follow in such cases is as follows:—The guardian for marriage, who may have negociated for the marriage, must apply to the District Judge for his sanction. Notice of the application should be given to the infant, to the guardian of person if he happens to be different from the guardian for marriage, and also to such relations of the minor as the Judge may deem necessary. He will then consider the objections and suggestions, if any, and then determine whether the proposal of the guardian for marriage is for the true welfare of the minor or whether the marriage is unsuitable by reason of incongruity of age, inequality of rank or fortune or any like reason. If, on the materials before the District Judge, he is satisfied that the marriage is not unsuitable he will sanction it.

The choice has to be made in the first instance by the guardian for marriage whoever he may be and the true function of the District Judge is to test whether the selection made by the guardian for marriage is or is not suitable.

Where the mother of a Mahomedan girl, who had been appointed guardian of her person by Court, with another relation applied for directions as to her marriage, and another relative opposed on the ground that the selection of a bridegroom by the applicant was unsuitable, and the District Judge without entering into the question as to which of the parties was the guardian for her marriage under the Mahomedan Law, directed his Nazir, a Hindu gentleman, to go to the village, and, after consultation with persons interested in the welfare of the minor, to submit a list of likely bridegrooms, and when the report of the Nazir had been submitted called upon the mother to nominate three of the young-men mentioned in the report, and on the mother failing to comply with the order proceeded to select a suitable husband for the girl on the basis of the report:

Held—*That the proceedings of the District Judge were throughout irregular, and though no appeal lay to the High Court from the order, it should be set aside in revision.*

These were an appeal and an application against an order of the District Judge of Birbhum, dated 6th December 1912.

The material facts will appear form the judgment.

Babu Nares Chandra Sinha for the Appellants-Petitioners.

The JUDGMENT OF THE COURT was as follows:—

We are invited to set aside, in the exercise of our appellate or of our revisional jurisdiction, an order which purports to have been made by the District Judge under the Guardians and Wards Act for the marriage of a Mahomedan girl, in respect of whose person and property guardians had been previously appointed by him. On the 12th February 1910, the District Judge appointed the mother of the infant as guardian of her person and the Nazir of the Court as the guardian

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of her properties. The order, however, was not communicated to the Nazir, and he does not appear to have had any hand in the management of the estate, till quite recently, when the fact was discovered that the Nazir had never been apprised of his appointment. The proceeding now before us was initiated on the 22nd May 1912, when an application was made to the Court, by the mother and by another person who claimed to be the half-brother of the father of the infant, for directions as to a suitable marriage of the girl. Objection was taken by a cousin of the father of the infant, who intimated to the Court that the selection of a bridegroom as made by applicants was entirely unsuitable. The District Judge thereupon directed the attendance of all near relations of the girl, and also ordered the girl to be produced in Court if the mother had no objection. On a later date, the girl was brought before the Court; the District Judge then directed his Nazir, Babu Saradindu Chakrabarti, a Hindu gentleman, to go to the village and after consultation with persons interested in the welfare of the minor, to submit a list of likely bridegrooms, stating their qualifications and positions in society and making his recommendation with reasons. Objection was taken by the mother and the alleged uncle to the adoption of this course on the ground that it involved a supersession of the person entitled, under the Mahomedan Law, to act as the guardian for marriage. No heed was paid to this, and on the 16th August, the Nazir submitted his report. On the 27th September, the girl was produced again before the Court and she expressed her preference for a youngman [illegible]ned Ishak. On the 4th October, the District Judge further considered the matter, and although he came to the conclusion that the Court could not undertake to perform the functions of a matchmaker, he called upon the mother to nominate three of the youngmen mentioned in the report of the Nazir. On the 6th December, the District Judge recorded in the order-sheet that the mother had failed to comply with the order of the 4th October, and he accordingly proceeded to select a suitable husband for the girl on the basis of the report submitted by the Nazir. This order is assailed before us as made without jurisdiction. In our opinion the proceedings before the District Judge have been throughout irregular.

The Guardians and Wards Act does not make specific mention of the disposal in marriage of an infant in respect of whose person a guardian has been appointed by the Court, although sec. 41, sub-sec. (1), clause (*d*), provides that the powers of a guardian of the person ceases in the case of a female ward by her marriage to a husband who is not unfit to be guardian of the person, or if the guardian was appointed or declared by the Court, by her marriage to a husband who is not in the opinion of the Court so unfit. The term "guardian" is defined in sec. 4, cl. (2), to mean a person having the care of the person of a minor or of his property or of both his person and property. Sec. 24 then prescribes the duties of a guardian of the person in these terms: "A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education and such other matters as the law to which the ward is subject requires". It is remarkable that while the legislature makes specific mention of support, health and education, no reference is made to the marriage of the minor. If we assume that the individual who has by law the right and duty of disposing of a boy or girl in

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marriage may be said to have for that limited purpose the care of his or her person, the question remains whether "disposal in marriage" can be treated as included in the general words, "such other matters as the law to which the ward is subject requires", which find a place in the concluding portion of sec. 24. The answer must plainly be in the negative in the case before us; we need not express any opinion as to what the answer may be in cases where the parties are not Mahomedans. In the first place, under the Mahomedan Law, which applies to the parties before the Court, the guardian of the person of an infant is not necessarily the guardian for the marriage of the girl. In the second place, the Mahomedan Law does not require that the guardian should provide suitable marriage for his ward, though it gives him the power to contract a marriage for the infant. The Mahomedan Law does not impose upon guardians any religious obligation to provide suitable marriages for their wards; indeed their power is so restricted that, where a minor has been given in marriage by a guardian other than the father, or paternal grandfather, the minor has what is called the option of puberty or option of repudiation, on attainment of age. We have therefore two fundamental positions under the Mahomedan Law, namely, *first*, the right of giving a male or female minor in marriage falls upon a line of guardians different from that to which the management of his property is entrusted and also from that to which the custody of his person is confined; and, *secondly*, that although the intervention of a guardian is an essential condition to the validity of the marriage of a minor, it is not obligatory upon the guardian of the person, nor even upon the guardian for marriage, to provide a suitable marriage for the ward [Macnaghten, Chap. VII, Articles 14, 16; Bailee, Book I, Chap. IV, page 45; Hamilton's Hedayah, Vol. I, Book I, Chap. II, pages 36, 37 and 39; Ameer Ali, Vol. II, pp. 280—282 (third edition); Shama Charan Sarkar, Vol. I, p. 329; Abdur Rahman, Arts. 31—37, 41 and 42; Abdur Rahim, p. 331]. It cannot reasonably be held that the Mahomedan Law on the subject of guardianship in marriage has been abrogated by implication by sec. 24 of the Guardians and Wards Act. One would have expected to find a specific statutory provision to this effect if the legislature really intended to interfere with the rule of Mahomedan Law which assigns the function of guardianship in marriage of an infant, under the name of *jabr*, to relatives who are not necessarily those entitled to the general care and direct custody (*hizanat*) of the person of the infant. The view we take is supported by the opinion of Sir Rowland Wilson (Anglo-Mahomedan Law, Arts. 90 and 117).

The question next arises, what is the true function of the District Judge in the matter of the disposal in marriage of a Mahomedan minor in respect of whose person a guardian has been appointed by him. We are not prepared to accept the extreme view that the marriage of an infant, who is a ward of Court, may be allowed to take place without the sanction or even the knowledge of the District Judge, although such view appears to have been indicated in *Bai Diwali* v. *Mati Karson* (1). It would, we think, be contrary to first principles to hold that although a minor is a ward of Court, an obviously unsuitable marriage may be arranged for her, while the Court is powerless to prevent what would manifestly be an irrevocable act permanently injurious to her best

(1) I. L. R. 22 Bom. 504 (1896).

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interests for life. If this view were not maintained, grave complications might also arise, because under sec. 41, sub-sec. (1), cl. (*d*), the powers of the guardian of the person cease, when such guardian has been appointed or declared by the Court, only when the marriage has taken place with a husband who is not, in the opinion of the Court, unfit to be guardian of the person of the girl. This clearly indicates the desirability, if not the absolute necessity, of the sanction of the Court, before the marriage is arranged and solemnised. We hold accordingly that a ward of Court cannot marry without the consent of the Court. This, indeed, has been recognised as an elementary principle in the law of England [*Eyre* v. *Shaftesbury* (2), *Jeffrys* v. *Vanteswarstworth* (3), *Tombes* v. *Elers* (4)], and it has been repeatedly held that if a proposed marriage is unsuitable, the Court can, as representing the Sovereign in whom the guardianship of all infants is, in theory, vested, restrain the marriage, even though the guardian or the father has given his consent [*Gordon* v. *Erwin* (5), *Wellesly* v. *Beaufort* (6), affirmed by the House of Lords, *Wellesly* v. *Wellesly* (7)]. This view was accepted as applicable to the case of a Hindu minor for whom a personal guardian has been appointed by the Court, in *Subhadra Koer* v. *Dhaja Dhari Goswami* (8), where it was ruled that marriage or connivance at marriage with a ward of Court, without consent of the Court, is a contempt of Court liable to be severely punished.

(2) (1723) 2 P. Wms. 103 (112).
(3) (1740) Barn. 141 (144).
(4) (1747) 1 Dick. 88.
(5) 4 Brown P. C. 355 (1781).
(6) 2 Russel 1 (29) (1827).
(7) 2 Bligh. N. S. 124; 1 Dow. N. S. 152 (1828).
(8) 15 C. L. J. 147 (1911).

The proper procedure to be followed in cases of this description may now be briefly described. The guardian for marriage of the infant, who may have negociated for the marriage, must apply to the District Judge for his sanction. Notice of the application should be given to the infant, to the guardian of person if he happens to be different from the guardian for marriage, and also to such relations of the minor as the Judge may deem necessary. He will then consider their objections and suggestions, if any, and then determine whether the proposal of the guardian for marriage is for the true welfare of the minor or whether the marriage is unsuitable by reason of incongruity of age, inequality of rank and fortune or any like reason. If, on the materials before the District Judge, he is satisfied that the marriage is not unsuitable, he will sanction it.

The order of the District Judge in the case before us, tested in the light of the principles just explained, is clearly unsustainable. No doubt, at one stage of the proceedings he rightly took the view that it is not the function of the District Judge to act as a match-maker, but at a later stage he adopted measures quite contrary to the principle he had laid down. There was also a dispute before him as to who was entitled under the Mahomedan Law to act as guardian for the marriage of the minor. This he did not decide as he should have done, but superseded both the claimants, appointed his Nazir to hold an enquiry in the village and to make a preliminary selection of possible bridegrooms, and finally called upon the mother to select three from amongst the persons named by the Nazir. When the mother, who was apparently treated as the guardian for marriage, could not make the selection, apparently for the reason that

she did not consider any of the youngmen named by the Nazir quite suitable, the District Judge proceeded to make his own choice. This was clearly an irregular procedure. It is difficult to see why the choice should be restricted to youngmen of the particular village, and why the guardian for marriage should be limited to the preliminary list of possible candidates prepared by the Nazir. The choice has to be made in the first instance by the guardian for marriage, whoever he may be, and the true function of the District Judge is to test, whether the selection made by the guardian for marriage is or is not suitable. The District Judge does not appear to have realised what responsibility would be involved, if he had, with or without the assistance of his Nazir, to select the most suitable bridegroom or bride, as the case might be, for every infant in the district in respect of whose person a guardian might have been appointed by him. Nor did the District Judge realise that while under the Mahomedan Law none but a Moslem can act as the guardian for marriage of a Mahomedan minor, the procedure he has followed has led to the supersession of such guardian by a Hindu gentleman, who, *primâ facie*, would not have an intimate knowledge of what would be deemed suitable in Mahomedan society.

The only other question which requires examination is, whether the order of the District Judge is open to appeal. We are of opinion that sec. 47, cl. (1), of the Guardians and Wards Act read with sec. 43, sub-sec. (1), and secs. 21, 25 and 26 does not cover the case; consequently the order is not open to appeal and can be set aside only in the exercise of our revisional jurisdiction.

The result is that the appeal is dismissed, but the Rule is made absolute and the order of the District Judge discharged. The records will be returned to him, to enable him to take such further steps, if any, as the parties interested may desire him to adopt in accordance with the principles explained above.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 703 OF 1914.

FLETCHER, J.
BEACHCROFT, J.
1914,
Heard,
26, November.
Judgment,
1, December.

SASHI RAJBUNSHI and others, Accused, Appellants,
v.
THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), secs. 337, 339—Forfeiture of pardon before Committing Magistrate—Joint trial of approver with other accused—Plea of bar on the ground of pardon, in the Sessions Court—Preliminary verdict of jury on such plea, propriety of, taking—Question of forfeiture of pardon is a question of fact for jury.

Several persons were charged with having committed dacoity. One of them, S, was tendered and accepted a pardon under sec. 337, Cr. P. C., whilst the proceedings were pending before the Committing Magistrate. The Magistrate subsequently forfeited the pardon granted to S and recommenced the enquiry from the stage at which it was interrupted against S by the tender and acceptance of the pardon. All the accused were committed to the Court of Sessions for trial and S having raised a plea in bar on the ground that he had received a pardon, the Sessions Judge took a special verdict from the jury in the first instance as to whether S had forfeited his pardon. The verdict of the jury was that S had forfeited his pardon and the trial was continued against all the accused.

Held—*That where an approver has forfeited his pardon in the Magistrate's Court,*

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there is no illegality in proceeding with the enquiry against him and in committing him for trial jointly with the other accused, and the commitment to and trial before the Sessions Court in the present case was not illegal.

That the course adopted by the Sessions Judge in the present case in taking a verdict from the jury in the first instance on the plea in bar was correct.

Held, *per* BEACHCROFT, J.—*That sub-sec. 2, sec. 337, Cr. P. C., does not mean that it is compulsory to examine the approver in the Sessions Court, if he has shown by his evidence in the Magistrate's Court that he is an untrustworthy witness.*

That under the present Code of Criminal Procedure, there is no provision for withdrawing the pardon. The act terminating the pardon was, under the old law, the withdrawal by the granting authority; under the present law, it is the forfeiture by the approver. It follows as a matter of course that when the approver is put on his trial, he may plead his pardon and in such case it must be shown that his pardon has been forfeited. The plea should be taken at the commencement of the proceedings before the Magistrate and it would then be necessary for the Magistrate to consider whether the pardon has been forfeited. But if the Magistrate decides against the approver or even if the plea is not taken before the Magistrate, it does not follow that the plea cannot be pressed in the Sessions Court and when the case comes before the Sessions Court that Court ought to try the question whether the pardon has been forfeited before trying the general issue.

That the question whether the pardon was forfeited was a question of fact for the jury.

QUEEN-EMPRESS *v.* NATU (1) *and* EMPEROR *v.* ABANI (6) *considered.*

This was an appeal preferred on the 6th October 1914 against the order of W. A. Watson, Esq., Sessions Judge of Murshidabad, dated 15th July 1914.

The facts of the case will appear from the judgment.

Babus Hemendra Nath Sen and *Santosh Coomar Bose* for the Accused.

Mr. Orr and *Babu Jyotish Chandra Hazra* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—The accused Ananta, Nani, Sashi, Gopal, Srikunta and Bolai were tried along with seven others, who have been acquitted, with having committed the offence of dacoity.

The trial took place before the learned Sessions Judge of Murshidabad and a jury. The six Appellants before us were convicted and each sentenced to undergo seven years' rigorous imprisonment. Against that conviction and sentence they have appealed to this Court. The principal point that has been argued in this appeal is as to the legality of the trial before the learned Sessions Judge. It appears that the accused Sashi was tendered and accepted a pardon under sec. 337 of the Code of Criminal Procedure on the 21st of April 1914 whilst the proceedings were pending before the Committing Magistrate. The Magistrate subsequently forfeited the pardon granted to Sashi and the magisterial inquiry was recommenced from the stage at which it was interrupted as against Sashi by the tender and acceptance of the pardon. The Magistrate committed all the accused for trial. Sashi having raised before the learned Judge a

(1) I. L. R. 27 Cal. 137 (1899).
(6) I. L. R. 37 Cal. 845 (1910).

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plea in bar on the ground that he had received a pardon the learned Judge took a special verdict from the jury in the first instance as to whether Sashi had forfeited his pardon. The jury having returned a verdict that he had done so, the learned Judge then continued the trial against all the accused.

Against this procedure two points have been urged on the appeal before us—(1) that the procedure of the Magistrate in recommencing the magisterial enquiry against Sashi from the stage it was interrupted by the tender and acceptance of the pardon and the commitment of Sashi to take his trial with the other accused was illegal, and (2) the taking of a special verdict of the jury as to whether the pardon granted to Sashi had been forfeited was also illegal. On the first point authorities have been cited showing that when the approver deviates from the condition of his pardon in the Sessions Court, he cannot be removed from the witness-box and placed in the dock as an accused. I should have thought that such a proposition did not require any authority. It is obvious that the Court of Sessions could not try a person who had not been committed for trial.

The question however as to whether or not an approver whose pardon has been forfeited by the Committing Magistrate can be committed and tried along with the other accused is a totally different question.

On behalf of the Appellants, the decision in the case of *Queen-Empress* v. *Natu* (1) is much relied on. No doubt the observations of the learned Judges (Rampini and Pratt, JJ.) in that case do lend support to the argument on behalf of the Appellants. In that case however a charge had been framed against the two approvers under sec. 194 of the Indian Penal Code without the sanction of the High Court. The remarks of the learned Judges that "a person to whom a pardon has been made should not be tried for an alleged breach of the conditions upon which the pardon was tendered until the original case has been fully heard and determined" show clearly that what the learned Judges were considering was the charge under sec. 194 of the Indian Penal Code.

In my opinion that case cannot be taken as an authority for the proposition that where the approver fails to act up to the condition of his pardon before the inquiring Magistrate the Magistrate cannot recommence the enquiry as against the approver and commit him to take his trial along with the other accused.

As against the interpretation sought to be placed on the decision in the case of *The Queen-Empress* v. *Natu* (1) by the learned Vakil for the Appellants, there is a considerable body of judicial authority in which a different view was taken. In the case of *Queen-Empress* v. *Brij Narain* (2), the learned Judges observed "we are unable to find anything in the Code of Criminal Procedure which would render it necessary that an approver whose pardon has been withdrawn by the Magistrate and who has been committed by the Magistrate in time to stand his trial along with the other accused in the case should be tried separately from them." A similar view was taken in the case of *The Emperor* v. *Budhan* (3), and also in the case of *Sultan Khan* v. *King-Emperor* (4), and in the case of *The Emperor* v. *Bala* (5),

(1) I. L. R. 27 Cal. 137 (1899).

(1) I. L R 27 Cal. 137 (1899).
(2) I L. R. 20 All. 529 (1898)
(3) I. L. R. 29 All. 24 (1906).
(4) 5 A. L. J. 691 (1908).
(5) I. L. R. 25 Bom. 675 (1901).

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a similar view seems to have been taken by Fulton, J.

I think that the opinions expressed in these cases are correct and that the case of *Queen-Empress* v. *Natu* (1) is only an authority for what was actually decided in that case, namely, that "a person to whom a tender of pardon has been made should not be tried for an alleged breach of the conditions upon which the pardon was tendered until the original case has been fully heard and determined." These remarks appear to me to be only capable of referring to a charge under sec. 191, although perhaps the judgment is not very happily worded. In that view the opinions expressed in *Queen-Empress* v. *Natu* (1) are not in conflict with the judgments of the High Courts of Allahabad and Bombay which I have cited above. I think therefore that the commitment to and trial before the Sessions Court in the present case was not illegal.

The second question urged on this appeal is that the trial was illegal by reason of the learned Judge having taken a verdict from the jury as to whether Sashi had forfeited his pardon or not. The only case cited in support of this argument is the decision of this Court in the case of *Emperor* v. *Abani* (6). That case came before a Special Bench of three Judges, consisting of Holmwood and Sharfuddin and D. Chatterjee, JJ., under the provisions of the Criminal Law Amendment Act. Holmwood, J., held that the Committing Magistrate was the sole authority to determine whether or not the pardon had been forfeited. The grounds on which Holmwood, J., formed this opinion are stated by him as follows :—" As soon as a charge is drawn up, the accused is *ipso facto* put upon his defence. The word 'withdrawal' has been left out of the present Code and as I have just said the forfeiture appears now to operate *ipso facto*". In support of this view the learned Judge relies on the case of *Queen-Empress* v. *Manik Chandra Sarkar* (7), which lays down that the withdrawal or forfeiture of the pardon should be by the authority that granted it. But that case did not decide that the validity of the withdrawal or forfeiture could not be questioned at the trial. The other case [*Kullan* v. *Emperor* (8)] relied on by Holmwood, J., with all due respect to the learned Judge, decided exactly the opposite to what that learned Judge did. Towards the end of his judgment Holmwood, J., however remarked that "it is open to the accused here to show that the statement he made on oath was not a false statement induced by improper influence". D. Chatterjee, J., held, that as the case came before the Court as a "special tribunal" under the provisions of the Criminal Law Amendment Act, the Court had no jurisdiction to enquire into the fact whether the pardon had been properly forfeited or not. Chatterjee, J., however remarked that "it is perfectly open to the accused to show before us in this Court, that the statements that are alleged to be false are true in fact or were induced by improper influences". The tribunal before which that case came was not a "special tribunal", but the High Court though, no doubt, the Bench was specially constituted to hear a case committed to it under the provisions of the Criminal Law Amendment Act. The provisions of the law except so far as they have been varied by the Criminal Law Amendment Act apply to such trials.

(1) I. L. R. 27 Cal. 137 (1999).
(6) I. L. R. 37 Cal. 845 (1910).
(7) I. L. R. 24 Cal. 492 (1897).
(8) I. L. R. 32 Mad. 173 (1908).

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I am unable to concur in the views expressed in the case of *Emperor* v. *Abani* (6) which appears to me to be opposed to whole current of judicial decisions in India. Nor can I understand the remarks of the learned Judges that if the Committing Magistrate was the sole Judge as to whether or not the pardon had been forfeited, the accused could be permitted to give evidence to show that his former statement was true or induced by improper influences. Such evidence would be irrelevant on the charge of dacoity against the accused, but would be relevant on the issue as to whether the pardon had been validly forfeited. On the other hand, there are a number of authorities in which a different view has been taken.

In the case of *Kullan* v. *Emperor* (8), the learned Judges remarked : "We think that where a pardon has been tendered and the approver is afterwards put on trial, he should be asked if he relies on it and if he says 'yes', which is a plea of pardon, the issue as to the pardon should be tried first." Again, in the case of *Alagirisami* v. *Emperor* (9), it was held that the Judge at the trial at the Sessions must leave it to the jury to decide, whether the pardon had been actually forfeited and not decide the point himself.

The High Court of Bombay has adopted a similar view.

In the case of *R.* v. *Bala* (5) the following observations appear in the judgment of the learned Judges : "As the law now stands, the question is whether the accused has forfeited his pardon by some act of his own—not whether the Magistrate has validly withdrawn it. This question is one of fact on which it is clear that the Magistrate may hold one opinion and the Sessions Court another just as may happen on any other question of fact at issue in the case. The Sessions Court has to determine for itself on the evidence before it whether the pardon has been forfeited; for, if not, the accused who has accepted such pardon cannot be tried". Again, in the case of *Emperor* v. *Kothia* (10), Aston, J., remarked : "It is therefore open to a pardoned accomplice, if placed on trial as an accomplice who has forfeited the pardon already accepted by him, to plead in bar of the trial that he did comply with the condition on which the tender of pardon was made, and such plea in bar of trial would have to be gone into and decided before the accused is called to enter his plea in deference to the charge of having committed the offence in respect of which the pardon was tendered". The same view was taken by the Chief Court of the Punjab, as will appear from the following remarks in the judgment in the case of *R.* v *Kalu* (11), "the word 'withdrawn' does not now appear at all. The word 'forfeited' has been substituted. Under the present Code, therefore, a pardon cannot be withdrawn, it can only be forfeited and whether or not it has been forfeited will be a question of fact to be tried and decided by the Court acting under competent authority, which tries such person in respect of the charge in regard to which a pardon was tendered to him". Against this large body of judicial authority there is only the decision in the case of *R.* v. *Abani* (6). But when that case is closely looked at, it cannot be taken as an authority the other way. For the Court admitted evidence to show that the statement of the accomplice whose pardon had been withdrawn

(5) I. L. R. 25 Bom. 675 (1901).
(6) I. L. R 37 Cal. 845 (1910).
(8) I. L. R. 32 Mad. 173 (1908).
(9) I. L. R. 33 Mad. 514 (1910).

(6) I L. R. 37 Cal. 845 (1910).
(10) I. L. R. 30 Bom. 611 (1906).
(11) 31 P. R. 1904.

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was not false and that such statement was induced by improper means which was clearly irrelevant on the charge of dacoity, but relevant on the plea as to whether the pardon had been validly withdrawn. In that view, the judgment in the case of *R.* v. *Abani* (6) can be reconciled with the decision of the other cases I have referred to above, although it may not have been strictly regular or in accordance with the weight of judicial opinion to have tried the plea in bar along with the charge on which the accused was committed for trial. The course adopted by the learned Judge in the present case in taking a verdict from the jury in the first instance on the plea in bar was manifestly correct.

Then a subsidiary point was raised that the fact that the learned Judge took the verdict of the jury on the plea in bar raised by Sashi after recording some of the evidence on the charge vitiates the trial. But Sashi when called upon to plead raised his plea in bar in such an obscure manner that the learned Judge apparently in the first instance did not grasp what Sashi meant when he said he was a witness. As soon, however, as the learned Judge realised the plea that Sashi wished to place before the Court, he proceeded in a regular manner, and any irregularity that there may have been cannot have prejudiced the accused at the trial. Finally, it was argued that the learned Judge in his charge to the jury on the charge upon which the accused had been committed for trial misdirected the jury. I was and still am unable to appreciate what were the misdirections the learned vakil for the Appellants complains of. But even if the portions referred to amounts to misdirections, they are of such a trivial nature that they could not possibly have had any effect on the verdict of the jury.

(6) I. L. R. 37 Cal. 845 (1910).

In the result, I think the present appeal ought to be dismissed.

BEACHCROFT, J.—The learned pleader for the Appellants bases his appeal on three grounds: (1) that the joint trial of the approver, Sashi, and the other accused was illegal, a branch of which argument is that it was incumbent on the prosecution to examine Sashi as a witness at the Sessions trial, (2) that the Judge adopted an extraordinary procedure in taking a verdict on the question whether Sashi had forfeited his pardon, after the examination of eleven only of the fifty-five prosecution witnesses, which seriously prejudiced the Appellants, (3) that there were misdirections in the charge to the jury.

Many cases are to be found in the reports in which the question of the joint trial of an approver with the other accused has arisen, and in approaching a consideration of these cases there is a broad dividing line between the two classes into which they naturally fall, a line which, I think, has not always been observed.

One class comprises those cases in which, at the Sessions trial, the approver has failed to observe the conditions of his pardon, and has then been transferred from the witness-box to the dock and tried with the other accused. Instances of such cases are those of *Queen* v. *Pitumber Dhobee* (12), *Queen* v. *Bipro Das* (13), *In re Joyndee Paramanik* (14), *Queen-Empress* v. *Mulua* (15), *Queen-Empress* v. *Rama Teran* (16) and *Queen-Empress* v. *Jagat Chandra Mali* (17). To the procedure adopted in such cases, there has been a double objection, *viz.*, that the trial of the approver was without jurisdiction,

(12) 14 W. R. Crim. 10 (1870).
(13) 19 W. R. Crim 43 (1873).
(14) 7 C. L. R. 66 (1880).
(15) I. L. R. 14 All. 502 (1892).
(16) I. L R. 15 Mad. 352 (1892).
(17) I. L. R. 22 Cal 50 (1894).

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he never having been committed to the Sessions and that to take him straight from the witness-box to the dock and try him with the other accused prejudiced him in his defence.

The second class comprises those cases in which in the Magistrate's Court the approver has failed to observe the conditions of his pardon and his pardon having been withdrawn, the enquiry against him in respect of the offence has been continued along with the enquiry against the other accused and they have jointly been committed to the Sessions. It is clear that remarks made in the first class of cases to the effect that the trial of the approver should await the termination of the trial of the other accused can have no application to the totally different state of facts met with in the second class when the approver comes before the Sessions Court as an accused and not as a witness, but those remarks have been quoted in support of the view that when the pardon has been withdrawn before the case has come to the Sessions, the joint trial is improper.

The current of decisions that the trial of the approver must await the trial of the other accused even in the second class of cases, was started by the case of *Queen Empress* v. *Sudra* (18) decided by a single Judge. This case does not really fall within either of the classes to which I have referred, for the approver was committed to the Sessions not on a charge of murder, which was the charge against the other accused, but in a separate proceeding on a charge of receiving stolen property belonging to the murdered man. The case turned on the meaning of the words "in the case" in sec. 337 of the Code of Criminal Procedure, and Knox, J., remarked that the approver should not be tried till the original case had been fully heard and determined. That this dictum could not be universally correct was realised by the learned Judge, who mentioned one difficulty which might arise from its universal application, *viz.*, what was to be done when some of the accused in the original case absconded, and hinted that in such a case the rule might be relaxed.

This case was subsequently dissented from by a Division Bench of the same Court, *Queen-Empress v. Brij Narain Man* (2), and the later decision was followed in *Emperor* v. *Budhan* (3).

Shortly after the decision in *Queen-Empress* v. *Brij Narain Man* (2) a Bench of the Bombay High Court in *Queen-Empress* v. *Bhau* (19) took the view that nothing could be done against an approver till the trial of the other accused at Sessions was finished. The learned Judges relied on the case of *Queen-Empress* v. *Sudra* (18) and five other cases not one of which is an authority for the general proposition stated. This case was doubted by Fulton, J., in the later case of *King-Emperor* v. *Bala* (5) and the judgment of Candy, J., shows that at an earlier stage a view inconsistent with that expressed in *Queen-Empress* v. *Bhau* (19) had been adopted

In this Court the only reported case is that of *Queen-Empress* v. *Natu* (1). In that case the commitment of the approver was criticised on three grounds, only two of which have any bearing on the present discussion These are that it was obligatory that the approver should be available as a witness at the Sessions trial and that the commitment of the approver before the trial of the other accused had

(18) I. L. R. 14 All. 336 (1891).

(1) I. L. R. 27 Cal. 187 (1899).
(2) I L. R. 20 All. 529 (1898).
(3) I. L R 29 All. 24 (1906).
(5) I. L. R. 25 Bom. 675 (1901).
(18) I. L. R. 14 All. 336 (1891).
(19) I. L. R. 23 Bom. 493 (1898).

terminated was illegal. Logically, the second reason would appear to depend on the first, for if there is no obligation that the approver should be available as a witness at the Sessions, there would appear to be no reason, as a general proposition of law, for delaying his trial till the termination of the trial of the other accused, though circumstances might exist, which would induce the Sessions Judge as a matter of discretion to direct a separate trial on the ground of inconvenience or possible prejudice to the other accused.

Sec. 337 (2), C. P. C., provides that a person accepting a tender of pardon is to be examined as a witness in the case. That condition is fulfilled when the approver is examined as a witness in the Magistrate's Court. In my opinion that sub-section does not mean that it is compulsory to examine the approver in the Sessions Court if he has shown by his evidence in the Magistrate's Court that he is an untrustworthy witness. It is contrary to all principles that the Crown should be obliged to examine as a prosecution witness, a person who has shown himself by his evidence in a previous stage of the case to be untrustworthy. This view was taken in the case of *Queen-Empress* v. *Ramasami* (20). Incidentally I may remark that the view expressed in the same case that beyond revoking the pardon nothing should be done against the approver until after the trial of the other accused is over is *obiter dictum* and based on the case of *Emperor* v. *Bhau* (19) and the cases therein quoted, which apply to an entirely different state of facts.

It is to be noticed that the learned Judges who decided the case of *Queen-Empress* v. *Natu* (1) though referring to sub-secs. (2) and (3) of sec. 337 say that the intention of the law is that the approver shall be "available" as a witness in the Sessions Court. If sec. 337 (2) really applies, his examination is compulsory. The language of the Code is imperative—"he shall be examined". I have pointed out that there is no obilgation on the prosecution to examine him at the Sessions trial, if he has previously shown himself untrustworthy. There is never any obligation on the accused to examine a witness, and with all respect to the learned Judges, I see nothing in the section to lead to the supposition that no action is to be taken against him in order that he may be "available" as a witness for the defence. In fact, he will be available as such witness if at the Sessions trial he is able to successfully plead that, he has not forfeited his pardon, though I do not wish to be understood as giving this contingency as a reason for differing from the view expressed in *Queen-Empress* v. *Natu* (1).

I am of opinion that where an approver has forfeited his pardon in the Magistrate's Court, there is no illegality in proceeding with the enquiry against him and in committing him for trial jointly with the other accused.

The second argument advanced by the learned pleader for the Appellants was, as originally formulated, that the procedure of the learned Sessions Judge was unintelligible, and it is quite clear that he did not realise what the object of the learned Judge was. It would have been better if the learned Sessions Judge had clearly stated in his order-sheet, what was the preliminary point on which he heard arguments on the 4th July. But an examination of the earlier proceedings leads to the conclusion that he was trying

(1) I. L. R. 27 Cal. 137 (1899).
(19) I. L. R. 23 Bom. 493 (1898).
(20) I. L. R. 24 Mad 321 (1900).

(1) I. L. R. 27 Cal. 137 (1899).

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a preliminary issue in bar on a plea by Sashi that he had been granted a pardon. On the charge being read, the following plea by Sashi was recorded, "that he is a witness, that he cannot be tried in this case and that he is not guilty". This may reasonably be read as, *first*, a plea of pardon, *second*, an objection to being tried jointly with the other accused, *third*, a plea of not guilty on the general issue.

It appears that an argument was then addressed to the learned Judge objecting to the Magistrate's procedure in cancelling the pardon and at once proceeding with the enquiry against the accused jointly. The learned Judge decided that he could do nothing in view of sec. 215 of the Code of Criminal Procedure. Then on the 4th July, after the examination of 11 witnesses, the evidence of Sashi given before the Committing Magistrate was read. This was followed by arguments on the "preliminary point". The Judge then charged the jury and took their verdict on the question whether Sashi had forfeited his pardon.

From this it is evident that the learned Judge was trying the preliminary issue raised by Sashi's plea of pardon as a bar to his being tried at all.

This raises the question whether the procedure adopted was correct. The learned pleader for the Appellants argues in the first place that the only person to decide whether the pardon was forfeited was the authority who granted the pardon, and in the second that if this was a question for the Court of Sessions it was one for the Judge to decide and not the jury, and to support the second part of the argument he relies on sec. 298 (1) (c) of the Code of Criminal Procedure.

In the case of *Queen-Empress* v. *Manik Chandra Sarkar* (7) it was decided that the authority which granted the pardon was the authority which had jurisdiction to revoke it. That case was decided under the old Criminal Procedure Code, Act X of 1882. The decision has become obsolete, for Act V of 1898 made a radical alteration in the law. Under the existing Code there is no provision for withdrawing the pardon, but the first clause of sec. 339 shows in what circumstances the pardon is forfeited and the second clause provides that when forfeited the approver's statement may be given in evidence against him. Under the old law the pardon remained in force until it was withdrawn by the authority granting it in consequence of a failure by the approver to observe the condition under which it was granted; under the present law the result of a failure to observe the conditions is that the approver may be put on his trial without any formal order of withdrawal or cancellation. The act terminating the pardon was, under the old law, the withdrawal by the granting authority; under the present law it is the forfeiture by the approver. It follows as a matter of course that when the approver is put on his trial, he may plead his pardon, and in such case it must be shown that his pardon has been forfeited.

Then arises the question what Court is to decide whether the pardon has been forfeited. The plea should in my opinion be taken at the commencement of the proceedings before the Magistrate, for it strikes at the jurisdiction to take any proceedings at all against the approver, and it would then be necessary for the Magistrate to consider whether the pardon had been forfeited. But if he decides against the approver or even if the plea is not taken before the Magistrate, it does not follow that the plea cannot be pressed in the Sessions Court. That is

(7) I. L. R. 24 Cal. 492 (1897).

the Court which has to decide on the guilt or innocence of the accused, and I cannot conceive that the Court which has to adjudicate on that point has its hands tied in regard to what may be the strongest and perhaps the only point in the accused's defence. The position is exactly the same as in any ordinary Sessions trial, *e.g.*, on a charge of Criminal breach of trust. The Committing Magistrate has to be satisfied both of the trust and of the breach before he can commit and the Sessions Court has to come to a finding on both points before it can convict. So if a pardon has been granted, the forfeiture must be proved.

When the case comes before the Sessions Court, that Court ought to try the question whether the pardon has been forfeited before trying the general issue. It is possible that the evidence on the issues may overlap and in some cases be practically identical and that seems to me to be the only argument against trying the question of forfeiture of pardon before calling on the accused to plead to the charge of the offence, and where such is the case, it might be a reason for the Judge to use his discretion and order the approver to be tried separately from the other accused.

In expressing the above views as to the change made in the law by Act V of 1898 and as to the duty of the Sessions Court to try the question whether the pardon was forfeited or not, I have not failed to consider the judgment of Holmwood, J., in *Emperor* v. *Abani Bhusan Chakrabati* (6). It is true that the learned Judge expresses the opinion that the enquiry as to forfeiture should not be re-opened at the trial, but in the concluding paragraph of his judgment he says, "it is open to the accused here to show that the statement he made on oath was not a false statement", which is only another way of saying that he may prove that the pardon was in fact not forfeited. The learned Judge thereby in effect says that the question may be re-opened. Chatterjee, J., in the same case says, "it was for the Committing Magistrate to decide this question (*i.e.*, the question of forfeiture). I say this with this qualification that this is only for the purpose of the commitment, and it is open to the accused to show before us in this Court that the statements which are alleged to be false are true in fact", which I take to mean that the Magistrate must come to a finding on the question of forfeiture before he can commit to the Sessions, that his finding has no effect beyond the proceedings in his own Court, and that the question can be re-opened in the Sessions Court. I consider that not only may the question be re-opened, but the onus is on the Crown to prove that the pardon has been forfeited.

Now, assuming that the procedure adopted was not quite correct, in that evidence should have been taken only as against Sashi in the first instance and only on the preliminary plea, there is no reason to suppose that any of the accused has been in any way prejudiced.

The argument that it was for the Judge and not the jury to decide whether the pardon was forfeited, is not supported by sec. 298 (1) (c) of the Code of Criminal Procedure. That clause refers only to a finding on a question of fact which it is necessary to prove to make other evidence admissible. Here the question of forfeiture of the pardon was important not for the purpose of making other evidence admissible, but for the purpose of determining whether the trial could at all continue as against Sashi. That was a question of fact for the jury.

(6) I. L. R. 37 Cal. 845 (1908).

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Contents.

NOTES

Culture and law.

Professor Kohler of Berlin is, perhaps, the most erudite and distinguished jurist of the present times. One of his most remarkable contribution to the legal literature is the Philosophy of Law which has recently been translated into English in America. We have not had yet a first hand acquaintance with this work but we find notices of it in our legal contemporaries from across the sea. We are told that the learned Professor accepts Hegel's *Phenomenology of Spirit* as the basis of his philosophy. The learned author says that the philosophy of law is a branch of philosophy dealing with man and his culture. Culture, he defines as the control of nature by science and art and every culture, in his view, must be provided with its corresponding and appropriate system of law. In this philosophy he deals with both private and public law from this point of view. The original work was written in 1909 and we presume that the learned Professor will find insuperable difficulty in the next edition of his work to reconcile his theory to the savagery of his compatriots in the modern European War.

Detention of captured enemy ships.

In the *Law Magazine and Review* the opinion is expressed that the great majority of cases brought into Court (Prize) resulted in decrees of detention. Such decrees are unknown to the practice in prize, and it would have been much better if the matters had simply been adjourned generally. It may be a question whether a decree having been definitely made can be superseded in future by another. If the Courts were asked to proceed to condemnation it might regard itself as *functa officio*. A prize must be brought to prompt trial—but the propriety of detention could then be pleaded as a reason for not immediately proceeding to sentence. Art. 2 of the Hague Convention which provides that if enemy ships are prevented by circumstances to depart within the period of grace contemplated by Art. 1, they shall only be detained and not confiscated. These provisions the writer considers are mere recommendations. No doubt they are so. But during the present war if these recommendations are acted upon and meet with the approval of the majority of the maritime nations, they will rise to the rank of approved practice which the minority will eventually have to accept.

Repudiation of Capitulation by Turkey.

Turkey has lately repudiated the capitulations which have been in force there for long. The European and American subjects in Turkey have for long been exempt from the local territorial jurisdiction and have been subject to the extra-territorial jurisdiction of the Consular Courts. Turkey has been protesting against the jurisdiction for some time past. It must be said that although the jurisdiction is claimed by virtue of capitulations which may be regarded as treaties yet an examination of the letters of the treaties would hardly support the superstructure of jurisdiction that has been raised thereon. They originated in the right of the Consul merely to attend Civil or Criminal trials where the subject of his State was concerned. It is

chiefly the language difficulty that has been instrumental in enabling the Consul to take part in such trials and gradually exercise even sole jurisdiction in their connection. The slender foundation in the treaties has thus been overgrown by a very large accretion of custom and practice. We presume that the Supreme Consular Court at Constantinople and the Appellate Jurisdiction of the Privy Council thereon are now things of the past. In the *Joris case*, where a Belgian was charged with shooting at the Sultan in Constantinople, the whole practice and procedure and extra-territorial jurisdiction were challenged and examined. It may be said that now the more liberal view of International Law would hardly lend any countenance to such jurisdiction where an Oriental Sovereign chooses to repudiate it. The repudiation by Japan of the jurisdiction was never questioned. So Turkey is certainly within her rights to repudiate the jurisdiction. But her repudiation gives rise to the question whether the Egyptian Government which has now repudiated the overlordship of the Turkish Sovereign would not be justified after this in repudiating also the jurisdiction of the Mixed Tribunal in Egypt which in a manner owes its jurisdiction to Consular Jurisdiction.

SIR SUBRAMANIA AIYER.

Sir Subramania Aiyer is a great name. The biography of this distinguished Indian by Rai Sahib S. M. Raja Ram Rao, Editor, *Wednesday Review*, with a foreword by the Right Hon'ble Lord Ampthill, *ex*-Governor of Madras, which has just been published, is a very interesting study from more points of view than one. A distinguished public man of India, a great Judge of the Madras High Court, Sir Subramania Aiyer is a "great gentleman in the truest and best sense of that time-honoured English word," as Lord Ampthill puts it in his respectful appreciation of the man whom he regarded as the "soul of honour", as a "man who had absolutely no personal ends to serve and who devoted his great abilities solely to the public good". Sir Subramania Aiyer's life is an example to all; neither too conservative nor too progressive, he may be taken as the model of an Indian gentleman. No modern biography, to quote again Lord Ampthill's words, could be of ter pu[illegible]c value in the Madras Presidency; life and character of the retired Judge nple of so noble and rare a kind that a record of them ought most certainly to be enshrined among the enduring memories of Madras.

Sir Subramania Aiyer's career from the time he won his first prize at school till he rose to be the Acting Chief Justice of Madras has been a series of successes following each other in logical sequence. There has been nothing of the adventitious or the unexpected in his life. He was born in the District of Madura on the 1st October 1842 and in his ninth year he was sent to school kept by a tailor who taught him the English alphabet. His real education began when he joined the then newly organised Zilla School in 1856.

After passing the final examination in the Zilla School in 1859, Subramania Aiyer entered the service of Government as a clerk in the Collector's office on Rs. 20 a month. Being desirous of taking the law as his ultimate profession, Subramania Aiyer passed the pleadership examination, but when he appeared before the District Judge for his *sanad*, an incident took place which undoubtedly gave him occasion for much reflection in after years. One Mr Cotton was then the District Judge of Madura. When Subramania Aiyer entered the court-room, he failed to *salam* to the Court, and the Judge took such a serious view of his conduct that not only was his application rejected, but he was literally pushed out of the Court. Disappointed and disgraced, he came back to his clerical duties in the Collectorate, but in 1862, when the new Code of Criminal Procedure came into force, he was appointed Public Prosecutor by the District Magistrate, but the good opinion that the Magistrate had of him could not save him; for the Judge before whom he had to conduct cases was the same Mr. Cotton who on hearing Subramania Aiyer on his first appearance cried out "Don't chatter like a monkey."

Such was the beginning of a career which ended in the Chief Justiceship of the Madras High Court.

Subramania Aiyer now thought of becoming a Vakil of the High Court, and as was usual with him he set about it in right earnest. He passed the Matriculation and the F.A. and the B.L. Examinations, and after being enrolled as a Vakil of the High Court, he came back to his district and began to practise in the Courts there. He soon built up a decent practice. Almost the first important case in which he was engaged was a suit against the Ramnad Zamindary in which the Madras Government

were interested, as they had advanced a loan of 12 lacs of rupees to the Zamindar. J. D. Mayne, the well-known Madras Barrister, who was then the Advocate-General, appeared for the Zamindar and Subramania Aiyer assisted him. Mr. Mayne was so satisfied with Subramania Aiyer's work that he reported to the Government that he might leave the case to be prepared by Subramania Aiyer himself. In 1888, he was appointed Government Pleader, and it fell to his share to prosecute the famous Nageshwar Aiyer Forgery Case—one of the cleverest forgeries on record in which Mr. Eardley Norton appeared for the defence. Another prosecution, still more sensational, was against the Mohant of Thirupathi. The Mohant was accused of placing copper instead of gold coins worth two lacs of rupees which, he asserted, he had placed in the foundation of the flag-staff of the temple which was newly erected. The Mohant felt himself secure in the belief that no Court of law or the Government would dare to remove the flag-staff which had been installed with due religious rites and find out his clever substitution of copper for gold. Subramania Aiyer was so convinced of the guilt of the Mohant that he insisted upon the flag-staff being removed and the foundations dug up. The High Court ordered the removal of the flag-staff and when the foundations were dug up, it was found that copper and not gold coins had been deposited there.

He was never enamoured of technicalities, but always took a broad view of things. As the law reports show, he was always in favour of advancing the rights of women in the holding of property. As instances, the cases of *Salemma* v. *Luchmana Reddi*, I. L. R. 21 Mad. 100, and *Subramanian Chetti* v. *Arunchelam Chetti*, I. L. R. 28 Mad. 1, may be cited. In the first of these cases, the land in dispute formed part of the emoluments attached to the office of *maniem* in a Government village. The Plaintiff's father formerly held the office, but having been guilty of embezzlement he was dismissed. The land was a few years afterwards enfranchised in favour of his wife, and after her death the Plaintiff as her unmarried daughter claimed the property in preference to her father's brother. The District Judge relying on a text of Katyayana held that the property, though acquired by the Plaintiff's mother, became on her death the Plaintiff's uncle's in his sole right and the Plaintiff had no title to it. The matter came up in appeal to the High Court and Subramania Aiyer, J., held that the property was the Plaintiff's mother's *stridhan* and gave a decree in favour of the Plaintiff. In the course of his judgment he observed—"No doubt judicial decisions have established that property inherited by a woman is notwithstanding the opinion of Vijnaneshwara to the contrary not *stridhanam*. But those decisions do not go the length of holding that Vijnaneshwara's doctrine as to *stridhanam* is otherwise unsustainable. It is scarcely necessary to say that Vijnaneshwara's statement that *stridhanam* is not to be understood in a technical sense was not mere philological observation. By laying down that proposition Vijnaneshwara and other great commentators who followed him succeeded in effecting a beneficial change in the archaic Smriti Law and placed women almost on a footing of equality with men as regards the capacity to hold property. It is on account of the boldness and reach of mind evinced by Vijnaneshwara in propounding his doctrine of *stridhanam* and his other theories that property is a matter of secular, not of religious, cognizance and *sapindaship* rests on consanguinity that the Mitakshara has become the chief authority on Hindu Law. A departure from the law laid down by such a high authority must not be made unless supported by adequate grounds."

In the other case Sir Subramania Aiyer delivered another important judgment on the Hindu Law of *stridhanam*. He held there that there is no necessary connection between the limited nature of the estate which a widow takes in her husband's property and the interest accruing to her in the income derived by her as such limited owner. He observed—"one can understand the corpus of the husband's estate being given to a female without the intention of diverting its eventual devolution from his family, the object being effected intelligibly enough by making the estate of such a taker a limited one. Where however what is given is current income not for mere use and return, but for actual consumption, it would be almost absurd to talk of an intention that there should be any reversion, it being now thoroughly well established that what may not have been consumed may be disposed of by the female as she likes. In such circumstances whether as a matter of common sense or of legal principle but one view is possible, *viz.*, that money so received is the absolute property of the woman descendible as such to her own heirs."

Sir Subramania Aiyer has during his public career been all along a prominent Congress man

and at its first session he seconded a resolution advocating the reform and expansion of the Legislative Councils. The resolution was moved by the late Mr. Kashinath Trimbuck Telang and supported by Mr. Dadabhai Naoraji. In seconding the resolution Subramania Aiyer made a memorable speech which was characteristic of the man. He said "The actual working of these Councils is enveloped in somewhat of a mystery, and to one outside it, it is a puzzle. How it is that the non-official members are so little able to do good of any kind . . With the best intentions in the world they find themselves in the wrong place and so long as the present constitution of these Councils remains unchanged, it is idle to expect that these non official members wi[illegible]prove of any great use to the country [illegible] If one carefully noted the successive laws that are enacted by these Councils one would plainly see that the functions of these Councils are limited to registering the decrees of the Executive Government and stamp them with legislative sanction."

Subramania Aiyer wanted to be thorough in every matter. In the pages of the biography one reads that a few months after his appointment as a Judge of the Madras High Court in succession to Sir Mutuswami Aiyer, he took with him to Bangalore, where he spent the long vacation, a copy of Bain's English Grammer and assiduously studied it. Sir Subramania Aiyer retired from the Bench after 12 years of strenuous work. At his present age of 73 he is full of energy and vitality. At the close of last year he delivered an address as Chairman of the Reception Committee of the Indian National Congress which shows that his interest in Indian public questions is to this day as keen as ever. With regard to such a man we cannot conclude without expressing our earnest desire that he may yet live for many years to come and serve as a model to his countrymen.

CURRENT INDIAN CASES.

(CIVIL.)

Civil Procedure Code, sec. 150—Transfer of business from one Court to another.

SUBBIAH NAICHER *v.* RAMANATHAN CHETTIAR, I. L. R. 37 Mad. 162

Sec. 150, C. P. C., refers to the transfer of business owing to an order of transfer by a superior Court as under sec. 24 or any such similar order and that mere alteration of jurisdiction through the Local Government's notifications does not transfer any business within the meaning of sec. 150.

Civil Procedure Code, sec. 96—Appeal.

M. SUBBAYA *v.* M. RACHAYYA, I. L. R. 37 Mad. 177.

Sec. 96, C. P. C., says that an appeal shall lie to the Court authorised to hear appeals. That Appellate Court is one which had jurisdiction when the suit was decided and not at the time when the appeal came to be presented.

Mahomedan Law—Marz-ul-maut.

KHURSHED HUSAIN *v.* FAIYAZ HUSAIN, I. L. R. 36 All. 289.

Under the Shia Law, a gift made in marz-ul-maut (death-illness) holds good to the extent of only one-third of the donor's estate in spite of the delivery of possession prior to his death.

Suit for declaration of title.

ISHWARI SING *v.* NARAIN DAT, I. L. R. 36 All 312.

The Plaintiffs sued for a declaration of their title in respect of certain land of which they were admittedly not in possession at least for seven years prior to the institution of the suit. The Plaintiffs' contention was that the land in suit was at the time of the institution of the suit lying waste and neither party was in possession of it and therefore the Plaintiffs need not have asked for possession.

Held That the Plaintiffs could have sued and ought to have sued for recovery of possession of the land in suit.

Arbitration.

CHATARBHUJ *v.* RAGHUBAR, I. L. R. 36 All. 354

It is settled law that in the case of an agreement to refer to arbitration, come to out of Court, neither party can revoke the agreement at his own will and pleasure, but either party may do so for good and sufficient cause.

Amendment of plaint.

BALKARAN *v.* GAYA DIN, I. L. R. 36 All. 370.

In allowing the amendment of a plaint, a Court has no power to allow a new cause of action to be introduced into a plaint after that cause of action has become barred by limitation.

Civil Procedure Code—Misjoinder.

BALKRISHNA DAS *v.* HIRA LAL BAGLA, I. L. R. 36 All. 406.

A Hindu widow, who inherited an estate from

her husband, was after her death succeeded by her daughter who transferred certain portions of the estate. The Plaintiff claimed as *bandhu* a one-third share of the estate admitting that one of the Defendants was entitled to two-thirds. The Plaintiff impleaded Defendants Nos. 1 and 2 as being in possession of some of the property, Defendants Nos. 3 and 4 as transferees of a portion of the estate from the daughter and Defendant No. 5 as a mortgagor of another portion of the estate from the same lady.

Held That the Plaintiff's suit was not bad for multifariousness, and he was entitled to join all the Defendants as parties to the suit, so as to enable him to recover his share in the whole of the estate.

Review.

THE ALL-INDIA DIGEST (CIVIL), 1811—1911. *By Sanjiva Row. Vol. X. Published by T. V. Venkasawmy Row and T. S. Krishnasawmy Row. Law Printing House, Madras. 1914.*

The volume under notice which completes the above Digest places in the hands of Indian lawyers a complete and accurate summary of the case-law as reported in the various law reports and journals in India and Burma, for a period of 100 years, dating from 1811 down to 1911. The present volume treats of the subject-matter from the letter V to Z, and also contains a list of important legal words and phrases with references, a table of cases digested with references to the original reports from which they have been taken and a table of the names of cases digested. The printing and get-up of the Digest are quite in keeping with the reputation of the Law Printing House.

Notes of Cases

ENGLISH LAW COURTS.

THE PRIZE COURT.- Before THE RIGHT HON'BLE SIR SAMUEL EVANS, President. *The "Miramichi"*. 23rd November 1914.

Contract concluded during peace, effect of, on outbreak of war—Municipal or International Law to govern—Property if passed to enemy; if not, not liable to capture—Enemy goods in British ships - Declaration of Paris.

Where all material parts of a contract took place bonâ fide *during peace, held that the law applicable was the ordinary Municipal Law of sale of goods.*

The *Miramichi* was a British ship, and in July last wheat was shipped therein at Galveston in Texas for Rotterdam, to some German firms who were the purchasers. On the vessel's voyage towards Rotterdam, the owners, by telegraph, directed her to proceed to Queenstown for orders, because of the outbreak of war. At Queenstown the owners communicated with the British Admiralty, and permission to proceed to Rotterdam was refused. Accordingly she proceeded to Eastham in the Manchester Ship Canal, where the cargo was seized. The Crown claimed the cargo as prize, contending that at the time of its seizure it was at the risk of the German enemies. The owners on the other hand contended that it was not subject to seizure, as it did not belong to the enemies, but to themselves as neutrals, being citizens of the United States. The contract and all material transactions in relation to it, up to the time of the seizure of the cargo, were entered into before the war or any anticipation thereof. The bill of lading was given in favour of the shipper, and was made out unto the order of one Davis or to his assigns. It was indorsed generally, and in due course the sellers paid the shipper for the wheat and obtained the bill of lading. They did not indorse in favour of the buyers, and it remained a bill of lading only indorsed generally. The necessary insurances were effected on July 23rd. On July 28th, the sellers drew a bill of exchange upon the buyers, and discounted it with the bankers, depositing with them the bill of lading and certificates of insurance to be delivered up on payment by the buyers through a Berlin Bank. On the same date the ordinary documents were forwarded to the same Berlin Bank for credit of the New York Bank. The buyers were duly notified of these matters, and an invoice was forwarded to them by the sellers, with all the necessary particulars of shipment, bill of exchange, etc. The buyers on tender refused to accept the documents, or to pay the sums due under the bill of exchange, on the ground of delay in production. The result was that the sellers or their bankers still held the bill of lading, and the bill of exchange remained unpaid.

The learned Judge held that the cargo seized was the property of the American claimants and was not subject to seizure. He said as follows:

Where, as in the present case, all the material parts of the business transaction took place *bonâ fide* during peace, and it becomes necessary to decide questions of property, I

hold that the law to be applied is the ordinary Municipal Law governing contracts for the sale and purchase of goods. Where goods are contracted to be sold, and are shipped during peace without any anticipation of imminent war, and are seized or captured afloat after war has supervened, the cardinal principle is that they are not subject to seizure or capture unless under the contract the property in the goods has by that time passed to the enemy. It may be that the element of risk may legitimately enter into the consideration of the question whether the property has passed or has become transferred.

But the incidence of risk or loss is not by any means the determining factor of property or ownership. (*Cf.* sec. 20 of the Sale of Goods Act, 1893.) The main determining factor is whether according to the intention of seller and buyer the property had passed.

The question which governs this case, therefore, is: Whose property were the goods at the time of seizure? (See the Consine Marienne, Edw., 316, and 2 E.P.C., 85; the Ida, Spinks, p. 26 and 2 E.P.C., 268; the Abo Spinks, p. 12, and 2 E.P.C., 285; the Vrow Margaretha, 1 C. Rob., 336; 1 E.P.C., 119; and the Ariel, 11 Moore, P.C., 119, and 2 E.P.C., 600.) The Attorney-General did not argue that the property had passed to the enemy buyers. He admitted that the neutral sellers had a *jus disponendi*, because they held the bill of lading, which was not indorsed, although possibly he may have intended to qualify this admission by saying that "therefore the sellers would have to that extent a special property" in the goods. But, at any rate, as he did not contend that by law the property had passed to the buyers, I think it sufficient to deal briefly with the matter, and to state my conclusions without elaborating the grounds.

In my opinion, the result of the many decisions from *Wait* v. *Baker* (1848), 2 Ex., 1, up to *Ogg* v. *Shuter* (1875), 1 C.P.D., 47; *Mirabita* v. *Ottoman Bank* (1878), 3 Ex. D., 172; and thence up to the Sale of Goods Act, 1893; of the provisions of the Sale of Goods Act, 1893, itself (following closely on these matters the judgment of LORD JUSTICE COTTON in *Mirabita* v *Ottoman Bank*); and of the decisions after the Act—*e.g.*, *Dupont* v. *British South Africa Company* (1901), 18 T. L. R. 24; *Ryan* v. *Ridley* (1902), 8 Com. Cas., 105; 19 T. L. R. 15; and *Biddell* v. *E. Clemens Horst* (1911), 1 K.B., 214 (C.A. 934; H.L., 1912, A.C., 18; 27 T. L. R. 331)—is that in the circumstances of the present case the goods had not at the time of seizure passed to the buyers; but that the sellers had reserved a right of disposal or a *jus disponendi* over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyers, and the bill of exchange for the price had been paid. It follows that the goods seized were the property of the American claimants; and were not subject to seizure. The Court decrees accordingly, and orders the goods to be released to the claimants.

Another point was that, as the cargo was in a British ship, it could not be seized or captured, even if it was enemy property. In my opinion, this proposition is wholly lacking in foundation. No authority was cited for it. Such a contention has never been put forward, because I think no one has thought that it could prevail. Enemy property at sea or in port can be captured or seized except where an express immunity has been created. Abundance of authority exists for this in the books of international jurists. (Wheaton's International Law, edited by Mr. Dana, 1866, Sect. 355 and Note 171.)

As to the suggestion that the right of seizure or capture of enemy property carried as cargoes in British ships no longer exists after the Declaration of Paris, it is obvious that the Declaration only modified or limited the right in favour of neutrals for the benefit and protection of the commerce of neutrals and in the interest of international comities; and did not in any other respect weaken or destroy the general right.

In my view, it is abundantly clear that enemy goods carried in British vessels are subject to seizure in port and capture at sea in times of war.

Attorney General, *Sir John Simon, K.C.*, and *Mr. Wright* for the Crown.

Messrs. Leslie Scott, K.C., and *Balloch* for the Claimants.

B. D.

CHANCERY DIVISION.—Before MR. JUSTICE SARGANT. *Armitage* v. *Borgmann*. 11th December 1914.

Trading with an enemy—Case of a partnership between English and German subjects—Effect of war.

In this action the Plaintiffs moved *ex parte* for the appointment of a receiver and manager of the business of tea-merchants, carried on in

partnership by the Plaintiffs and the Defendants, who were Germans. The partnership was created by a deed in 1913, which provided that if the Defendants were called away for active service in the German Army, they would not cease to be partners in the firm, but that a third person therein named should be entitled to be admitted as a partner in place of the Defendants for the unexpired term, and receive the profits due to the Defendants. On July 31st 1914, the Plaintiffs and the Defendants entered into an additional agreement which affirmed the previous agreement and provided that in view of the war one Batty was to be a partner for the unexpired term of the partnership, during the joint lives of the Defendants, on receipt of a salary. The Defendants shortly afterwards left for Germany, and the Plaintiffs continued the business as usual. It was now contended for the Plaintiffs that the partnership was *ipso facto* dissolved by the declaration of war, and that the Plaintiffs could not trade with the enemy.

The learned Judge granted the order. He said that the deed of 31st July was entered into after the order for German mobilization had been made and when war, not only with Russia but also with France, was imminent. Indeed, he rather thought that most people at that time considered that war between Germany and Great Britain was probable. In their evidence the Plaintiffs said:—"The absence of the Defendants has not affected the control or management of the firm, and there is no practical obstacle to the effective continuance of the business." So that at present, having regard to that and the license, there was no difficulty as regarded outside persons.

But the English parties were entirely uncertain whether the declaration of war had put an end to the partnership. On the other hand, it might be that the partnership was only suspended, and at the end of the war the business might continue. In that case the English partners might be liable if they acted on a wrong view of the law, and he thought that he ought to appoint the receiver and manager, not to wind up the partnership, but to continue the business. The appointment ought not to be made beyond a time when the Defendants might be heard under rules which he understood were being framed. The appointment would be for two months only, and Plaintiffs must forthwith take out a summons for directions to see what could be done in the meantime in the way of service. Leave would now be given to them to serve the notice of motion with the writ of summons.

Mr. Henry Terrell, K.C., and *Mr. N. C. Armitage* for the Plaintiffs.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

The important cases to be fully reported hereafter.

CIVIL APPELLATE JURISDICTION. Before HOLMWOOD and CARNDUFF, JJ. APPEAL FROM ORDER No. 410 OF 1912. DINABANDHU JANA AND ANOTHER, Appellants *v.* CHINTAMONI JANA AND OTHERS, Respondents. Heard, 14th and 15th December. Judgment, 22nd December 1914.

Award—Private arbitration—Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 15, 20—Decision on a point not referred—Law, mistake of—Decision patently contrary to law.

This was an appeal from an order allowing an award to be filed under para. 20, Sch. II of the Civil Procedure Code.

There were four brothers named Chintamoni, Dinabandhu, Jagabandhu and Keshari who were joint in mess and property. Chintamoni had three sons—Dasarathi, Panchanidi and Brahmanand. Keshari had a son who died in his father's lifetime and Keshari adopted Brahmanand. Keshari died before 1909. At the beginning of December 1909 the three surviving brothers separated in mess and on the 25th December 1909 an agreement was signed by the three brothers and on behalf of Brahmanand by his natural father and guardian Chintamoni to submit their affairs to arbitration with a view to partition of their properties according to shares and to settle certain disputes among them as regards the property in certain business, religious endowments, liability to debts, etc. On the 26th December 1909, the arbitrators made a draft award as to the shares and as to properties standing in the names of persons outside the arbitration and as to properties standing separately in the names of Chintamoni, Panchanidi and Chintamoni's wife. They also decided the question of the *sebaitship* of the thakurs, and declared the order of succession to the *sebaitship* by primogeniture in Chintamoni's family.

Held, that a mistake of law on a legal point, specifically referred to them, would not have vitiated the award, but a decision affecting the succession that was not referred to them and

a decision that was patently contrary to law could not be accepted by the Court and was a bar to the filing of the award in Court, though it might not affect the contract between the parties on the other points.

Where any of the grounds mentioned in para. 14 or 15, Sch. II of the Civil Procedure Code, was proved, the Court could not proceed to file the award where the matter had been referred to arbitration without the intervention of the Court. Even if the invalid portion of the award was separable, it would still not be enforceable by the summary procedure of r. 20.

Babus Ram Chandra Mozumdar and *Chandra Sekhar Banerjee* for the Appellants.

Babus Provas Chandra Mitter and *Suresh Chandra Chakrabarty* for the Respondents.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and COXE, JJ. APPEAL FROM APPELLATE DECREE NO. 3015 OF 1909. MUSSAMMAT BIBI SALIMAN, Defendant No. 1, Appellant *v.* UDHORAN SAHI (Plaintiff) AND FAZUL NADDAF (Defendant No. 2), Respondents. Heard, 4th and 5th January. Judgment, 5th January 1915.

Burden of proof—Fraud—Rent, exaggerated claim for.

The appeal arose out of a suit for a declaration that a rent-decree obtained by the Defendant No. 1 against the Defendant No. 2 was fraudulent. The suit which was said to be fraudulent was instituted on the 16th December 1907. About a month before that the Plaintiff applied for execution of a mortgage-decree which he held against the Defendant No. 2 with respect to some land included in the Defendant No. 2's holding. This land he subsequently purchased in execution of his mortgage-decree. The act of fraud pleaded was that the rent claimed in the suit was greatly exaggerated, that the rent of the holding was Rs. 5 odd, whereas the suit was brought for rent at the rate of Rs. 5 odd in cash and 4½ maunds of produce. The lower Appellate Court placed the burden of proof on Defendant No. 1.

Held, that it was for the Plaintiff to prove affirmatively that the rent sued for was more than the rent due and that the exaggerated rent was claimed in order to defraud him.

Moulvi Muhammad Mustafa Khan for the Appellant.

Babu Baidyanath Narain Singh for the Respondents.

A. T. M. *Appeal allowed: case remanded.*

CIVIL APPELLATE JURISDICTION.—Before N. CHATTERJEA and GREAVES, JJ. APPEALS FROM ORDERS NOS. 288 TO 293 OF 1912. NARENDRA CHANDRA LAHIRI, Decree-holder, Appellant *v.* AFIFANNESSA BIBI AND OTHERS, Judgment-debtors, Respondents. Heard, 16th December 1914. Judgment, 13th January 1915.

Limitation—Bengal Tenancy Act (VIII of 1885 as amended by Act I of 1908, E. B. and A. Tenancy Act), Sch. III, Art. 6—Decree obtained by a co-sharer landlord for his share of rent—Decree for sum of money not exceeding Rs. 500—Decree passed more than three years before application for execution.

The question raised in these appeals was whether an application for execution of a decree obtained by a co-sharer landlord for his share of the rent, in a suit to which the other co-sharers were not parties, the decree being for a sum of money not exceeding Rs. 500, was governed by the special limitation provided by Art. 6 of Sch. III of the Bengal Tenancy Act, as amended by Act I of 1908, E. B. and A. Tenancy Act. The decree in each of these cases did not exceed Rs. 500 and was made more than three years before the date of application for execution, and the question therefore was whether the decrees were made in suit between landlord and tenant, to whom the provisions of the Bengal Tenancy Act were applicable.

Held, that Art. 6, Sch. III of the Bengal Tenancy Act, as amended, applied to the case.

Thakamani Dasi v. *Mohendra Nath Dey* (10 C. L. J. 463), followed.

Mr. K. B. Dutt v. *Gostho Behary Banerjee* (16 C. W. N. 1006), doubted and distinguished.

Babu Nagendra Nath Ghose for the Appellant.

None appeared for the Respondents.

A. T. M. *Appeals dismissed.*

SASHI RAJBUNSHI *v.* THE KING-EMPEROR.

As regards the arguments that the learned Judge misdirected the jury, it is sufficient to say that no passage in the charge has been pointed out which justifies the suggestion.

I agree that the appeal should be dismissed.

Appeal dismissed.

[PRIVY COUNCIL.]

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.
LORD SHAW.
MR. AMEER ALI.
1914,
Heard, 28 and 29, October.
Judgment, 18, November.

HAMABAI FRAMJEE PETIT, Appellant,
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Respondent;
and
MOOSA HAJEE HASSAM and ors., Appellants,
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Respondent.

"Public purpose," what is—Lease by Government reserving power to resume for public purposes—Land wanted to build houses for use as private residence by public servants—Government's decision that purpose public, value of.

Land given in lease by the East India Company was sought to be resumed by Government (as successors of the Company), under a clause which reserved power to resume it for "public purposes", for the purpose of erecting dwelling houses which they could offer to Government officials at adequate rents for their private residence. The Judges in India having agreed in holding that the scheme was a public purpose within the meaning of the clause, the Judicial Committee affirmed that decision.

Decisions which construed the words "public purposes" as used in a Statute of Elizabeth with reference to exemptions from rating afforded no help in construing the words in the contract.

The phrase "public purposes" in the contract must include a purpose in which the general interest of the community is concerned.

Government are primâ facie *good judges of what is a public purpose, but not absolute judges.*

The Judicial Committee would be slow to differ, when judges thoroughly conversant with the conditions of Indian life have held that the scheme would be to the public benefit by helping the Government to maintain the efficiency of its servants.

These were two appeals from two judgments of the Bombay High Court (Sir N. G. Chandavarkar and Batchelor, JJ.), dated the 5th September 1911, which affirmed the judgments of Beaman, J. By an indenture, dated the 18th April 1854, the Hon'ble East India Company leased to the Appellant the land in dispute for a term of 99 years, renewable in perpetuity at a small annual rent.

The said lease contained the following provision for the resumption of the said land in the event of its being required for a public purpose:—

"It is hereby agreed and declared that in case the said Company, their successors or assigns, shall for any public purpose be at any time desirous to resume possession of the premises hereby granted, or any part or parts thereof, or in case the said yearly rent hereby reserved, or any part thereof, shall be in arrear and unpaid for the space of twenty days next after any of the time or times limited for payment thereof (the same being first lawfully demanded), or if the said Buchooboye, widow, her heirs, executors, administrators, or assigns, shall attempt to assign or make over any part or parts of the said

demised premises contrary to the true intent and meaning of these presents then and in every such case and from thenceforth it shall be lawful to and for the said Company, their successors or assigns, into and upon the said hereby demised premises or any part thereof in the name of the whole to re-enter, and the same to have again, re-possess and enjoy as in their first and former estate, and the said Buchooboye, widow, her heirs, executors, administrators and assigns therefrom to remove, expel and to put out anything herein contained to the contrary notwithstanding. Provided always, that in case of resumption as aforesaid the said Buchooboye, widow, her heirs, executors, administrators and assigns, shall be entitled to and shall have six calendar months' previous notice in writing of the intention of Government in that behalf, and shall also be paid for all buildings and improvements of which possession shall be taken according to such just and fair valuation as may be made by any Committee to be appointed by Government for that purpose."

The Government now claimed to resume the land for the purpose of utilizing the same for the residence of Government officers, that being, in the opinion of the Government of Bombay, a public purpose within the meaning of the said lease. Both Courts allowed the Plaintiff's claim in ejectment. The learned Judges of the Appellate Court delivered the following judgments :—

CHANDAVARKAR, J.- I agree with Beaman, J., from whose decree this appeal is preferred, that the English decisions which were cited before him and which have also been cited before us in support of the Appellant's contention as to the meaning of the term "public purposes," all turned upon its meaning with reference to the law of rating and cannot be safe guides in the present case, where different considerations have to be taken into account. Those were decisions upon the interpretation of a section in the Poor Relief Act of 1601 (43 Eliz., Ch. 2), according to which the test for determining whether a particular property is liable to the rate there contemplated is that of beneficial occupation. No doubt in determining what is beneficial occupation the English Courts have gone on to consider whether the occupation is for a public purpose, a term which does not occur in th section of the Statute. But the rule to be deduced from them as now prevailing is that there is no beneficial occupation for the purposes of rating, where property is occupied either by the Crown or by the servants of the Crown for Crown purposes, the occupation of the latter being in that event occupation of the Crown itself [*Mersey Docks v Cameron* (1)]. And the reason of the rule is that the Crown, being not named in the Statute, is not bound by it That even upon that test, the decisions are not easy to reconcile with one another or with any logical principle is apparent from the remarks of Sargent, C. J., in the judgment of this Court in *The University of Bombay* v. *The Municipal Commissioner for the City of Bombay* (2), of Lord Alverstone, C. J., in the English case of *Wixon* v *Thomas* (3) and of Lord Bramwell in *Coomber* v *Justices of Berks* (4) The case of *Wixon* v *Thomas* (3) is instructive as showing the present tendency of the English Courts towards a more liberal interpretation of the term "public purposes" even with reference to the law of rating

In the present case that expression occurs in a perpetual lease granted by the East India Company in 1851 under whom the Appellant claims, subject to the condition that the Company should be entitled to resume the land "for any public purposes." The case of Government, who claim under the Company, is that the cost of living, including house-rent, having increased in the town and Island of Bombay, it has become necessary in the interests of the public administration and the efficiency of the public service to

(1) 11 H L. C. 443 at pp 503, 504 (1865).
(2) I. L. R. 16 Bom. 217 (1891).
(3) [1911] 1 K. B. 43 (1910).
(4) [1883] 9 A. C. 61 at p. 79.

attract the ablest of their officials serving in the Mofussil to this City by providing suitable house accommodation to them on easier terms than those prevailing in respect of house-rent. For that purpose Government desire to resume this and other lands on the strength of the condition as to resumption abovementioned. Whether it is a public purpose or not must depend on the question whether the proper housing of their officials by Government is for the public benefit or not The 39th section of the Statute, 21 and 22 Vict., C 106 (1858), by section 1 of which the rule of the East India Company was terminated, enacted that "all lands, etc., moneys, etc., and other real and personal estate" of the Company "subject to the debts and liabilities affecting the same" and "the benefit of all contracts, etc., and all right to fines, penalties, and forfeiture, and all other emoluments, which the said Company shall be seized or possessed of, or entitled to," at the time of the commencement of the Act, "except the capital stock of the Company and the dividend thereon, should become vested in Her Majesty, to be applied and disposed of," subject to the provisions of that Act, "for the purposes of the Government of India." All property belonging to the Company at the time the Act commenced and the benefit of all contracts entered into by the Company and enforceable by it became vested in the Crown for these latter purposes which in essence are public purposes. The Government of India exists for the benefit of His Majesty's Indian subjects and whatever conduces to that benefit must be a public purpose That benefit can be secured primarily only by an efficient administration, which means an efficient service. Such service must depend on the efficiency of the men who are appointed to carry out the purposes of the Government of India, and who are, therefore, the servants of the Crown. If a state of things comes about which shows that in a city like Bombay the best men available from among these servants are reluctant to serve because of the increasing hardness of life in point of house accommodation and house-rents, the Government is entitled to say that it raises a serious question as to the future of the public administration and that the public benefit must suffer if the best officers available are compelled to serve as servants of the Crown in the city under such hard conditions. It is no reasonable answer to that consideration that the men are bound to serve wherever they are appointed, because Government never engaged to provide them with house accommodation on more or less easy terms. It is true Government are not bound in that respect but the question is not one of legal obligation but of general expediency and public benefit. And in this connection it is a material circumstance disclosed by the Civil List that it has been in this country customary for Government to provide house allowance to its officials, where that is, in its opinion, necessary in the interests of the public service. In substance there can be no difference between a house allowance and house accommodation.

There is no definition of "public purpose" in any of our legislative enactments to afford us a clue to the meaning of the term save one in the Land Acquisition Act; but that is a partially inclusive, not an exhaustive definition Though the Legislature has not defined it for general purposes, it has given us a sufficient indication in the Land Acquisition Act of what it intended the term should convey, having regard to the constitution and objects of Government in and the special needs of this country. By clause (3) of section 6 of the Act, the Legislature has directed that a declaration by Government that a certain land "is needed for a public purpose" shall be "conclusive evidence" that it is so needed What could have been the object of the Legislature in making Government the sole judge of what is a public purpose under the Act but this that having regard to the conditions in this country, the needs of sound administration, and the public weal, it should not be hampered by any refined distinctions and legal subtleties but must be left to interpret the expression "public purpose" in a wise and reasonably liberal spirit. Though, strictly speaking, this rule of the Legislature does not bind the Court, interpreting the expression where, as in the present case, it occurs in a contract, yet the Court may well take the Legislature as its guide in ascertaining the meaning of the expression. It was con-

ceded by Mr. Setalvad for the Appellant that if Government had sought to acquire this very land under the Land Acquisition Act, on the ground that it was needed for building a house for the residence of its servants, he could not have quarrelled with the declaration that the land was needed for a public purpose. In that case he could not have fairly argued that Government were endeavouring to acquire the land merely for a private benefit the benefit to an individual or individuals in the guise of a public purpose If that is so, why should the Court treat this case on different considerations, if on the proved facts it finds that the purpose for which Government claim to resume the land involves, in its opinion, the element of public benefit and therefore of public purpose, understanding that expression to mean any object which secures the good of the public by securing the efficiency of those servants of the Crown on whose service the public good materially depends? The Court would under these circumstances defer to the declaration of Government on the analogy of the Land Acquisition Act unless the purpose stated was so flagrant as to involve, on no reasonable consideration, the element of public benefit.

It was said, however, that the element of public purpose such as it is, must be held to vanish in view of the fact that Government intended to charge rent to the official who would be housed in the building proposed to be erected on this land after resumption. This charging of the rent, it is urged, will bring pecuniary benefit to Government and the building will be occupied by the official who will pay the rent, not solely or exclusively in his capacity as a servant of the Crown. A similar argument was urged in this Court in the *University of Bombay* v. *The Municipal Commissioner for the City of Bombay* (2). The question there was whether the University of Bombay was an institution for a charitable purpose and therefore entitled to exemption from Municipal taxes It was argued for the Municipality that the University was not an institution of that character and therefore not entitled to exemption, because it "obtained an income from the fees paid by the students on the occasions of the Examinations held by the University" and that "it derived a revenue from the occupation of the buildings." In the judgment of this Court, Sargent, C. J., disposed of the argument by pointing out that "the sole test" under the Bombay Municipal Act was whether the building of the University "was exclusively occupied for a charitable purpose;" "and the mere circumstance that small fees are required from the students before examining them which produce a revenue insufficient to defray the expenses of the University in conducting those examinations and keeping up the necessary establishment and which requires to be considerably supplemented by Government cannot, in our opinion, alter the essential character of the purpose for which the buildings are occupied." So also, in the present case, the sole test, under the lease which we are construing, is whether the building proposed to be erected on the land in dispute after resumption by Government is for "any public purpose." If the element of that purpose exists, the mere fact that Government will charge a moderate rent, not such rent as the letting value of the property will yield in the market, cannot alter the essential character of the building as one used for a public purpose. In this connection it is to be remarked as a circumstance of some importance that the expression used in the lease is not "a public purpose" but "any public purpose." The word "any" used to qualify the public purpose must have, in my opinion, been used designedly to make clear the intention of the lease that Government should be entitled to resume the land whenever any consideration or need of public benefit, of any kind, arises, though it may involve at the same time some private benefit.

In arriving at this conclusion, I have not overlooked the meaning of the expression "public purpose" given in *Moses* v. *Marsland* (5). There relying on the authority, *Josolyne* v. *Meeson* (6), Bruce, J., said that "a place used for public purposes means, not a place used in the public interest but a place to which the public can demand admission or to which they are in-

(2) I. L. R. 16 Bom. 217 (1891).

(5) [1901] 1 K. B. 668.

(6) 53 L T. 319 (1885).

vited to come." The learned Judge would appear to have intended that as the colloquial and general meaning independently of its meaning in the particular Statute which he had to construe. Apart from the fact that the decision in *Moses* v. *Marsland* (5) proceeds on the construction of the Statute and on the principle of *ejusdem generis*, and that the observation of Bruce, J., is so far an *obiter dictum* a reference to *Josolyne* v. *Meeson* (6) on which Bruce, J., and Phillimore, J., relied shows that in this latter case the meaning of the expression "public purpose" went on its limited construction as used in an English Statute and on the rule of *ejusdem generis*.

On these grounds, in my opinion, the decree appealed from must be affirmed with costs.

Our decision in Appeal No. 24 of 1910 governs also Appeal No. 25 of 1910. In this latter appeal two additional points were sought to be urged by Mr. Setalvad for the Appellant at the hearing. The first was that there had been no legal notice of the intention of Government to resume the land, because the actual notice given had been addressed to the lessee after he had died and not to his Executors. The Executors, however, received the notice, and replied to it, and therefore such irregularity, as there was, was cured by waiver on their part. The second objection was that Government claimed in the plaint a strip of land belonging to the lessee which was not covered by the grant to him. The Advocate-General for Government having explained the facts with reference to this point, Mr. Setalvad admitted that he had urged it under a misapprehension. The decree in this appeal too must be confirmed with costs.

BATCHELOR, J.- By a lease executed on the 18th April 1854 the East India Company demised the land in suit to the Defendant's predecessor-in-title for a term of 99 years at a yearly rent of Rs 11-2-3, the term being renewable indefinitely on certain prescribed conditions. But the lease contains a clause declaring "that in case the said Company, their successors or assigns shall for any public purpose be at any time desirous to resume possession of the premises * * * then and from henceforth it shall be lawful to and for the said Company, their successors or assigns into and upon the said hereby demised premises, or any part thereof in the name of the whole, to re-enter, and the same to have again repossess and enjoy as in their first and former estate."

On the 16th October 1908 the Defendant was served with a notice from the Collector of Bombay informing her that the Plaintiff, the Secretary of State for India in Council, was desirous to resume possession of the land for a public purpose, and calling upon her to surrender possession on the 18th April 1909, the Plaintiff undertaking to pay for all buildings and improvements on the land on a fair valuation. The Defendant, however, declined to surrender possession, and this suit is brought to eject her. Mr. Justice Beaman, before whom the suit was tried, decreed in favour of the Plaintiff, and against that decree the Defendant brings the present appeal.

The only question raised is whether the purpose of Government in seeking to resume this land is a "public purpose" within the meaning of that clause in the lease which I have cited; if it is a public purpose, then admittedly the suit must be decreed.

Now upon the question of fact as to what is the purpose of Government there is no dispute In para 5 of the plaint it is stated compendiously as being "the purpose of providing accommodation for Government officers" Stated more fully, the case for the Plaintiff is this: owing to certain economic conditions of life in Bombay, notably owing to the heavy house-rents there prevailing Government are embarrassed in their selection of officers to fill public appointments in this city; instead of having the entire *cadre* of their officers as the field of choice, they are driven to restrict their selection to a smaller group of officers, who, as bachelors or as having private means or otherwise, are enabled to meet the additional expenses incurred by living in Bombay. The purpose now actuating Government is to remove this embarrassment by resuming the land in suit and other land held on similar tenure, and by building on it houses to be leased to their resident officers on rents bear-

(5) [1901] 1 K. B. 668.
(6) 53 L. T. 319 (1885).

ing a reasonable proportion to the officers' salaries

The accuracy of this description of the purpose of Government has not been challenged before us, and sufficient proof of it will be found in the evidence of Mr. W Cameron, the Secretary to Government in the Public Works Department That gentleman speaking on behalf of Government, says: "Our selection is much cramped in existing circumstances because good men whom I would like to recommend are not able to serve here I have always to consider whether the officer can afford to serve in Bombay House-rent, say Rs. 150 in Poona, would be Rs 400 in Bombay; and Poona is next (*i.e.*, the next most expensive place) after Bombay" He clinches this evidence by an instance from his own personal experience, narrating that in 1900 he had to decline an offer to serve in Bombay as he could not afford the extra expense

On the question of fact, then, I need not say more The purpose of Government in attempting to resume this land is as I have described it The question is: is that a "public purpose" within the meaning of the lease? I am of opinion that it is, but before explaining the grounds of my opinion it will be convenient to consider certain English decisions which the Defendant claims as authorities for the view that the purpose of Government being as I have described it, is not a "public purpose" The decisions referred to are *Gambier* v. *Overseers of Lydford* (7), *Martin* v. *Assessment Committee of the West Derby Union* (8), *Showers* v. *Assessment Committee of the Chelmsford Union* (9), and *Jones* v. *The Mersey Docks Trustees* (1). I have set out these cases *en bloc*, because I do not think they demand separate consideration here. I will accept Mr. Setalvad's position that, despite the actual decision in *Jones's* case (1), the learned Judges' discussions of the phrase "public purposes" in the earlier cases remain unaffected as indications of the meaning which that phrase was construed to bear; but even so I cannot bring myself to understand how those discussions can possibly assist the Court in the very different controversy which has now to be determined. Indeed the very reference to these cases is, I cannot but think, an illustration of a practice which in *Quinn* v. *Leathem* (10) elicited from the Earl of Halsbury, L. C., the following protest:—"There are," said His Lordship, "two observations which I wish to make, and one is that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found The other is that a case is only an authority for what it decides I entirely deny that it can be quoted for a proposition that may seem to follow logically from it" In the case before us I cannot see that there is even an appearance of logical connection between the "public purposes" of the cases decided under a particular English Rating Statute and the "public purposes" of the lease of land in Bombay in 1854 For the only "public purposes" with which the English Courts were concerned were purposes sufficient to negative such beneficial occupation as would under the Statute of Elizabeth attract the liability to rating. So, the only question decided in those cases was the question whether a particular occupation was rateable, and the cases cannot properly be quoted as authority for more than was decided. I could understand the relevance of an appeal to those decisions if, the contemplated houses being supposed to be built and the English Statute being supposed to be law in Bombay, the question were whether the houses would be exempt or rateable; and I am prepared to grant that, on these suppositions, the houses would be rateable. Neither that, however, nor anything like it is, I conceive, the question now before the Court And if the point need further elaboration, I would adopt the Advocate-General's illustrative instance Under the lease in suit Government, I suppose, could certainly resume the land for the purpose of building, say, a public school, or a Fire Brigade Station; yet both of

(1) 11 H. L. C 443 at pp 503, 504 (1865).
(7) 3 E. and B 346 (1854).
(8) 11 Q B. D. 145 (1883)
(9) [1891] 1 Q B. 339.
(10) [1901] A. C. 495.

these intitutions would be rateable under the English Statute. It would seem to follow, therefore, that the "public purposes" of the Indian lease are wider than the "public purposes" considered in the English cases as contract with beneficial occupation. I would add that, in seeking to apply the decisions of the English Courts in such a case as this, there is some danger of overlooking an essential feature of difference, I mean the difference, in the position of a Government in England from the position of an Indian Government with its more direct and constant relations with the general community, and its necessarily more active interference in the affairs of the people. On the whole, then, I am unable to recognise that the English decisions quoted can be referred to as guides for the interpretation of the words of the present lease.

If that is so, and if this lease is to be construed from its own language, then I cannot doubt that Beaman, J.'s decision is right. General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase "public purposes" in the lease; it is enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned. That it is so concerned here must, I think, be plain to any one familiar with the relations between an Indian Government and its subjects, the innumerable points at which those relations are close and direct, and the multifariousness of the duties for whose discharge the community looks to Government and the officers of Government. Here, therefore, it is especially necessary in the interest of the public that Government should be able to appoint to posts in the Capital City those officials who, they are satisfied, are most competent to fill such appointments. It is directly to the gain and advantage of the public that, on an appointment falling vacant, the enquiry by Government should be, who is most capable of filling the vacancy, and not, who can best afford the expense of filling it.

The validity of these considerations is denied by Mr. Setalvad, who replies that they would justify the resumption of the land for the purpose, say, of building a Gymkhana for Government officials in order to preserve their health and efficiency, yet such a purpose, he contends, would certainly not be a public purpose within the lease. To that I can only answer, first, that hypothetical cases are best postponed for decision until they have ceased to be hypothetical; and, secondly, that, assuming the Gymkhana would not be a public purpose, there is surely a rather obvious distinction between a place of recreation and a house to live in, the former may be conducive to good work, but the latter is a condition precedent to all work.

The same result is reached if we consider that the provision of house accommodation does not, for our present purposes, materially differ from the grant of a local allowance to cover the heavy charges on account of rent in Bombay. Yet I cannot see how it could be contended that such an allowance, if made, was not made for a public purpose. Again, on the proved and admitted facts, we have it that there are not now in Bombay enough suitable houses for the number of officials whom it is necessary to post here. Unsuitable houses may exist, but for the purposes of the argument, they are equivalent to no houses, a proposition which I merely state in passing since it has not been suggested before us that the officers of Government should be relegated to such houses as could at present be found for their occupation. The case, therefore, is as if Government were proposing to build for officers necessarily stationed in Bombay houses where no houses existed before, and it seems to me certain that that would be a public purpose. It would be as much a public purpose as the purpose or object of the officers' appointments.

For these reasons I am of opinion that the decree under appeal is right and I agree that the Appeal should be dismissed with costs.

I agree also with what my learned colleague has said in decision of the related appeal. The point as to notice is clearly without substance and the other point as to the strip of land was abandoned. No other point was taken before us.

Mr. L. DeGruyther, K. C., and *Mr. Kenworthy Brown* for the Appellants submitted that a "public purpose" within the meaning of the lease meant an occupation or user by the public and not by private persons. To provide private residences for Government officers was not a public purpose contemplated by the lease. If the Government were entitled to resume the land for every purpose which it considered a public purpose the lease in perpetuity would be converted into a tenancy-at-will. The true test was that there must be a change in the nature of occupation or user from private into public. The Land Acquisition Act, I of 1894, provided a machinery for compulsory acquisition by the Government. Under the provisions of sec. 6 of that Act a declaration made by the Government was conclusive evidence that the land was needed for a public purpose, but the Act had no application to the present case, and from the provisions of that Act no inference adverse to the Appellant ought to be drawn.

Sir Erle Richards, K. C., and *Mr. G. R Lowndes* for the Respondents were not heard.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—The same general point is raised in these two appeals.

The first Appellant was lessee under the Government as successors of the East India Company under a lease of date 18th April 1854, which lease contained a power of resumption in favour of the lessor if "the Company, their successors or assigns, shall, for any public purpose, be at any time desirous to resume possession of the premises granted" . . . upon certain terms as to notice and compensation.

The second Appellants are holders of land under Government in virtue of a Sanad originally granted to one George King on 6th April 1839, by the said East India Company, which declares the ground given in occupation is to be "at any time resumable by Government for public purposes" upon certain terms as to notice and compensation.

The Government gave notice in both cases to resume for a public purpose. On being challenged as to what that public purpose was, they explained that they wished for the ground in order to erect dwelling houses, which they could offer to Government officials at adequate rents for their private residence. Suitable houses for Government servants are not easily obtainable in Bombay; but it is not said that obtaining quarters of some kind is an impossibility. The whole question, therefore is: Is such a scheme a "public purpose" within the meaning of the contracts contained in the lease and the Sanad?

The learned Judge of first instance in the High Court of Judicature at Bombay and the Appeal Court of the same Court have both held that it is. The learned Judges in the Courts below have, in deference to citations made before them, elaborately considered many of the decisions which construed the words "public purposes," as used in the Statute of Elizabeth with reference to exemptions from rating. In the end, however, they came to the conclusion that those decisions afforded no help as to the proper construction to be put on the words of these contracts; and in that conclusion their Lordships unhesitatingly agree.

The argument of the Appellants is really rested upon the view that there cannot be a "public purpose" in taking land if that land when taken is not in some way or other made available to the public at large. Their Lordships do not agree with this view. They think the true view is well

expressed by Batchelor, J., in the first case, when he says :—

"General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase "public purposes" in the lease; it is enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned"

That being so, all that remains is to determine whether the purpose here is a purpose in which the general interest of the community is concerned. *Primâ facie* the Government are good judges of that. They are not absolute judges. They cannot say : "*Sic volo sic jubeo*," but at least a Court would not easily hold them to be wrong. But here, so far from holding them to be wrong, the whole of the learned Judges, who are thoroughly conversant with the conditions of Indian life, say that they are satisfied that the scheme is one which will redound to public benefit by helping the Government to maintain the efficiency of its servants. From such a conclusion their Lordships would be slow to differ, and upon its own statement it commends itself to their judgment.

Their Lordships are therefore of opinion that on the general point the view of the Courts below was right.

A special point was taken in the second case as to sufficiency of notice. It is enough to say that the view of the Courts below was clearly right in this matter.

Their Lordships will humbly advise His Majesty to dismiss the Appeals, but there will be no costs to either party before this Board.

Solicitors : *Messrs. T. L. Wilson & Co.* for Hamabai Framjee Petit.

Solicitors : *Messrs. Latteys* and *Hart* for Moosa Hajee Hassam.

The Solicitor, India Office, for the Secretary of State for India in Council.

B. D. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 612 OF 1911.

MOOKERJEE, J. BEACHCROFT, J. 1913, Heard, 7 and 8, May. 1914, Judgment, 27, May.

RAMESWAR MONDAL and ors., Defendants, Appellants,

v.

PROVABATI DEBI, Plaintiff, Respondent.

Hindu widow, alienation by—Rent of superior landlord—Legal necessity—Suit against Hindu widow—Reversioner whether necessary party—What passes at a sale in execution of a decree against Hindu widow—Limitation Act (XV of 1877), Sch. I, Arts. 141, 120—Specific Relief Act (I of 1877), sec. 42.

The powers of a Hindu widow in respect of alienation of the estate of her husband are similar to those of the guardian of an infant.

HUNOOMAN PERSAD *v.* BABOOEE MOONRAJ (8), KAMESWAR *v.* RUN BAHADUR (9), LALA AMARNATH *v.* ACHHAN KUER (10) AND BHAGWAT DYAL *v.* DEBI DYAL (11), *followed.*

The mere fact that money is raised for payment of rent and applied for that purpose is not sufficient to prove legal necessity.

The creditor to protect himself where he is not shown to have made a bonâ fide *enquiry must prove that there was an*

(8) 6 M. I. A. 393 ; 18 W. R. 81 (1856).

(9) I. R. 8 I. A. 8 : s. c. I. L. R. 6 Cal. 843 (1880).

(10) L. R. 19 I. A. 196 . s. c 420 (1892).

(11) 12 C. W. N. 393 : s. c. L. R. 35 I. A. 48 I. L. R. 35 Cal. 420 (

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actual pressure on the estate, such as an outstanding decree or an impending sale which the widow is not capable of meeting.

LALA AMARNATH *v.* ACHHAN KUER (10), DHARAMCHAND *v.* BHAOANI MISRAIN (14), SREENATH *v.* RUTUNMALA (15), SRIMOHUN *v.* BRIJ BEHARY (16), LALA BYJNATH *v.* BISSEN (17), MATA PERSHAD *v.* BHAGEERUTHEE (18), GHANSHYAM *v.* BADIYALAL (19) AND LAKSHMAN *v.* RADHA BAI (20), *followed.*

Where a Hindu widow obtains a loan, she is at liberty to bind herself personally or when the purpose for which she borrows is a necessary one, she is at liberty to bind her husband's estate and the intention must be gathered from the statement if any in the deed or from the surrounding circumstances.

DAMODAR *v.* JANKIBAI (21) AND PROSUNNA *v.* UMEDAR RAJA (22), *referred to.*

A decree for rent which has accrued due after the death of her husband is primâ facie a personal decree against the widow.

JIBANKRISHNA *v.* BRAJALAL (7), KRISTO GOBIND *v.* HEM CHANDRA (37), MOHAMMED SADAT ALI *v.* HARASUNDARI (38) AND BIRESWAR *v.* KAMAL KUMAR (39), *followed.*

The mere fact that the widow intended to create a liability on the estate is not enough. The creditor has also to show that he intended to enforce such liability and the true test is to see whether the proceeding in which the sale was directed was brought against the widow personally or with a view to affect the whole inheritance.

JUGAL *v.* JOTENDRA (40), COURT OF WARDS *v.* RAMAPUT SINGH (41), SRINATH *v.* HARI (42), RAMLAL *v.* AKHOY (43), RADHA KISHEN *v.* NAUROTAN LAL (44), BRAJA *v.* JOGGESWAR (45), KISTOMOYEE *v.* PROSUNNO (46), BISTO BEHAREE *v.* BYJNATH (47), BAIJUN *v.* BRIJ BHOOKAN (48), BIRESWAR *v.* KAMAL KUMARI (39), SADAT ALI *v.* HARASUNDARI (38) AND TRILOCHAN *v.* BAKKESWAR (49), *referred to.*

It is not necessary that a reversioner should be joined as party to the suit, but if he is so joined, the fact would afford clear indication that the creditor intended to make the inheritance liable.

BHAGARATHI DAS *v.* BALESWAR BAGERTI (50), MOHIMA CHANDRA *v.* RAMKISHORE (5), SRINATH DASS *v.* HARIPADA (42), NUGENDRA *v.* KAMINI (51) AND LLOYD *v.* JOHNES (52), *referred to.*

Where the property is not in possession of the Defendants and the Plaintiff cannot ask for ejectment as against them, a

(7) I. L. R. 30 Cal. 550 : s. c. 7 C. W. N. 125 (1903).
(10) L. R. 19 I. A. 196 : s. c. I. L. R. 14 All 420 (1892).
(14) L. R. 24 I. A. 183 : s. c. I. L. R. 25 Cal 189 ; 1 C. W. N. 697 (1897).
(15) Beng. S. D. A. 421 (1859).
(16) I. L. R. 36 Cal. 753 (1909).
(17) 19 W. R. 80 (1873).
(18) 2 All. H. C. R. 78 (187).
(19) I. L. R. 24 All. 547 (1902).
(20) I. L. R. 11 Bom. 609 (1887).
(21) 5 Bom. L. R. 350 (1903).
(22) 13 C. W. N. 353 (1908)
(37) I. L. R. 16 Cal. 511 (1889).
(38) 16 C. W. N. 1070 (1912).
(39) 17 C. W. N. 337 (1912).
(5) 23 W. R. 171 ; 15 B. L. R. 142 (1875).
(38) 16 C. W. N. 1070 (1912).
(39) 17 C. W. N. 237 (1912).
(40) L. R. 11 I. A. 6 : s. c. I. L. R. 10 Cal 985 (1884).
(41) 14 M. I. A. 605 (1872).
(42) 3 C. W. N. 637 (1899).
(43) 7 C. W. N. 619 (1903).
(44) 6 C. L. J. 490 (1907).
(45) 9 C. L. J. 346 (1909).
(46) 6 W. R. 304 (1866).
(47) 16 W. R. 49 (1871).
(48) L. R. 2 I. A. 275 : s. c. I. L. R. 1 Cal. 133 (1875).
(49) 15 C. L. J. 428 (1910).
(50) 19 C. L. J. 155 : s. c. 17 C. W. N. 877 I. L. R. 41 Cal. 69 (1913).
(51) 11 M. I. A. 241 (267) (1867).
(52) 9 Ves. 37 (57) (1803).

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declaratory suit is maintainable under sec. 42 of the Specific Relief Act.

SUBRAMANIYA *v.* PARAMASWARAN (53) AND MALAIYYA *v.* PERUMAL (54), *followed.*

This was an appeal from a decision of E. Panton, Esq., District Judge, Burdwan, dated 2nd December 1910, modifying that of Babu Aghore Chandra Hazra, Subordinate Judge, Burdwan, dated 9th September 1905.

The facts of the case are shortly as follows :—

One Rakhal Chandra Mookerjee owned an eight annas share of two *putni mahals*, Joaldanga and Chakchanda. Rakhal died in July 1883 leaving behind his wife Sukhoda Sundari, and his unmarried daughter Provabati Debi. Sukhoda Sundari remained in possession of properties left by Rakhal. Rakhal and his brother Bagal had borrowed various sums from the Mondal Defendants and to secure payment of these Sukhoda and Bagal executed a usufructuary mortgage bond for Rs. 3,115 on the 15th November 1883, the bond to be paid off by the usufruct of the property in 1901. Subsequently on the 12th May 1885 Sukhoda and Bagal borrowed a sum of Rs. 300 by simple bond for payment of *putni* rent of the aforesaid *putni mahals*. The Mondals instituted a money-suit, No. 70 of 1888, for realisation of the money due on the aforesaid bond and obtained a decree on the 6th April 1888. In execution of this decree the property mortgaged by the aforesaid usufructuary mortgage bond was sold and purchased by the Mondal Defendants for Rs. 745 on the 2nd July 1888. Sukhoda died on the 21st November 1901 and then her daughter Provabati Debi succeeded to the estate left by Rakhal. Provabati instituted the present suit on the 18th November 1904 for a declaration that the Mondals had no right to the *putni* properties aforesaid after the death of her mother which since then had devolved upon her. It was also stated that the *putni mahals* were subsequently put up for sale under Reg. VIII of 1819, and a *durputnidar* on payment of the *putni* rent was in possession of the *putni mahal* as *girbidar*; and Plaintiff was not entitled to possession until the *girbi* was paid off; and that under the circumstances the Plaintiff instituted this suit simply for the declaration of her right as aforesaid.

The Defendants by their written statement averred that the debt was incurred by the widow Sukhoda for legal necessity, that the sale was binding on the Plaintiff, that a declaratory suit was not maintainable. The Subordinate Judge found that the sale was binding upon the Plaintiff reversioner. He however found that as the mortgagee brought the mortgaged property to sale in contravention of the terms of sec. 99 of the Transfer of Property Act, the sale was void *ab initio*, and the Plaintiff was entitled to the declaration sought for, but she must pay to the Mondal Defendants Rs. 309-1-6. There was an appeal to the District Judge by the Mondals and a cross-appeal by the Plaintiff against the judgment of the Subordinate Judge. The District Judge on appeal reversed the decision of the Subordinate Judge on the ground that the suit was bad for misjoinder of causes of action and parties. Against this judgment, the Plaintiff appealed to the High Court, and in second appeal the High Court set aside the judgment of the District Judge and the case was remanded to the lower Appellate Court for a trial on the merits. The District Judge on remand found that only the limited estate of Sukhoda passed at the execution sale. In this view the District Judge dismissed the appeal of the

(53) I. L. R. 11 Mad. 116 (1887).
(54) 21 Mad. L. J. 1022 (1911).

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Mondal Defendants and decreed the cross-appeal of Plaintiff. Hence this appeal by the Defendants.

Mr. Sinha (with *Babus Probhas Chandra Mitter* and *Hiralal Sanyal*) for Appellants. – In the present case the debt was incurred for legal necessity and the reversioner is bound by the sale. Refers to *Munshi Karimuddin* v. *Kunwar Gobind Krishna* (55).

Dr. Rash Behary Ghosh (with *Babus Bipin Behary Ghosh* and *Bankim Chandra Mukherjee*) for Respondent- Referred to *Srimohun* v. *Brij Behary* (16), *Baijun* v. *Brij Bhookan* (18), *Mohima Chandra* v. *Ramkishore* (5) and *Srinath* v. *Hari* (12).

The finding is that there was no legal necessity. Even when there is justifying necessity the suit must be properly represented and the reversioners ought to be made parties to a suit on a bond executed by the widow for debts which might or might not bind the estate. If the creditors intend to proceed against the estate and bind the reversioner, he must frame his suit accordingly: *Srinath* v. *Hari* (12), Story on Equity Pleadings, Art. 141, *Lloyd* v. *Johnes* (52). Reference was also made to the following case: *Kristo* v. *Hem* (37), *Mohammed Sadat Ali* v. *Harasundari* (38), *Bireswar* v. *Kamal* (39), *Braja* v. *Jiban* (6), *Jiban* v. *Braja* (7), *Giribala* v. *Srinath* (33), Mayne on Hindu Law and Usage, Art. 855.

(5) 23 W. R. 174; 15 B. L. R. 142 (1875).
(6) I. L R. 26 Cal. 285 (1898).
(7) I. L. R. 30 Cal. 550: s. c 7 C. W. N 425 (1903).
(16) I. L. R 36 Cal. 753 (1909).
(33) 12 C. W. N. 769 (1908).
(37) I. L. R. 16 Cal. 511 (1889).
(38) 16 C. W. N. 1070 (1912).
(39) 17 C. W. N. 337 (1912).
(12) 3 C. W. N. 637 (1899).
(48) L. R. 2 I. A. 275: s. c. I. L R. 1 Cal. 133 (1876).
(52) 9 Ves. 37 (57) (1803).
(55) 13 C W. N. 1117 at p. 1123 (P. C. (1909).

Babu Probhas Chandra Mitter in reply.

Cur. adv. vult.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the first nine Defendants in a suit by a Hindu reversioner for declaration that certain alienations, made by a widow in possession of the estate of her husband, were in excess of her authority and do not bind the inheritance. The properties in dispute belonged to the father of the Plaintiff, Rakhal Chandra Mookerjee, and his brother Bagal Chandra Mookerjee. Rakhal Chandra Mookerjee died in 1883, leaving a widow Sukhoda Sundari Debi, and an unmarried daughter by her, Provabati Debi now Plaintiff-Respondent before us. On the 25th November 1885, Sukhoda Sundari Debi and her brother-in-law Bagal Chandra borrowed a sum of Rs. 399 from Rameswar Mondal, the first Defendant in this suit. The creditor sued on the money bond, and obtained an *ex parte* decree on the 6th April 1888. The decree was executed in due course, and the right, title and interest of the judgment-debtors in the disputed properties were sold on the 2nd July 1888, when the decree-holder, now represented by the Appellants, became the purchaser for Rs. 745, in the name of one Moheswar Bhattacharji. The sale was confirmed on the 7th January 1889, and the sale-certificate was issued in the name of the ostensible purchaser on the 12th February 1889. Meanwhile on the 22nd November 1888, Sukhoda Sundari had sold the same properties again to the Defendants other than the Appellants. Sukhoda Sundari died on the 21st November 1901, when the succession opened out to the Plaintiff as the reversionary heir to the estate of her father. On the 18th November 1904, the Plaintiff commenced the present action

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for declaration that the execution sale as also the private alienation were without legal necessity and were not operative after the death of her mother. She further impeached the validity of the execution sale on the ground that the decree-holder held a mortgage on the property sold and has acted in contravention of the provisions of sec. 99 of the Transfer of Property Act. She did not sue for recovery of possession, as the estate was in the hands of an under-tenure-holder who had saved it from a sale under the Putni Regulation and had obtained possession which would continue till his advance was repaid or satisfied from the profits. The Defendants resisted the claim of the Plaintiff on the ground, amongst others, that the sales had taken place for legal necessity. The Subordinate Judge found this point in favour of the purchaser at the execution sale, but against the purchasers at the private sale. In this view, he gave the Plaintiff a conditional decree against the former, who became entitled to receive a proportionate share of the purchase money, and an unconditional decree against the latter, whose conveyance was declared to be wholly inoperative. On appeal by the Defendants, the District Judge reversed this decree and dismissed the suit on the ground that it was bad for misjoinder of parties and of causes of action. On appeal to this Court, Brett and Sharfuddin, JJ., held on the authority of the decisions in *Ishan Chandra* v. *Rameswar* (1), *Nanda Kumar* v. *Banamali* (2), and *Lala Rupnarain* v. *Gopal Devi* (3), that there was no misjoinder of parties or of causes of action and that the Plaintiff was competent to maintain one suit against all the transferees in respect of the estate of her father to which she had become entitled on the death of her mother. The appeal was accordingly allowed and the case remanded, so that the appeal preferred to the District Judge might be heard on the merits. In so far as the private sale is concerned, no attempt appears to have been made to assail the conclusion of the Subordinate Judge that it was bad for want of consideration and legal necessity, and his decision upon the point must be taken to have become final. We are concerned, at this stage, only with the effect of the execution sale of the 2nd July, 1888. As regards this sale, the Subordinate Judge found, first, that the money had been borrowed by the widow for payment of rent to the Zamindar and was applied for that purpose; secondly, that the sale was void, because held in contravention of sec. 99 of the Transfer of Property Act and, thirdly, that a declaratory decree should be made in favour of the Plaintiff, conditional on payment by her of a sum of Rs. 309-1-6 to the first nine Defendants, as such money had been applied by the widow for the benefit of the estate. Upon appeal the District Judge has found, first, that the loan was taken by the widow and the money borrowed was applied by her for payment of rent due to the superior landlord; secondly, that as laid down in *Asutosh Sikdar* v. *Beharilal Kirtania* (4), the sale was not void but merely voidable, because held contrary to the provisions of sec. 99 of the Transfer of Property Act, and, thirdly, that it was unnecessary to avoid the sale, because it had passed to the purchaser nothing beyond the limited estate of the widow, as laid down in the cases of *Mohima Chandra* v. *Ramkishore* (5) and

(1) I. L. R 24 Cal 831 (1897).
(2) I. L. R. 29 Cal. 871 (1902).
(3) L. R. 36 I. A. 103 : s. c. I. L. R. 36 Cal. 780 ; 13 C W N. 920 (1909).
(4) I. L. R. 35 Cal. 61 : s. c. 11 C. W. N. 1011 (1907).
(5) 23 W. R. 174 ; 15 B. L. R. 142 (1875).

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Brajalal v. *Jibankrishna* (6), which was confirmed on appeal to the Judicial Committee: *Jibankrishna* v. *Brajalal* (7). The District Judge has also overruled the contentions that the suit was not maintainable for a pure declaratory decree without consequential relief, and was, in any view, barred by limitation. In this view the District Judge has modified the decree of the primary Court and has given the Plaintiff an unconditional declaration that the execution sale does not bind the estate in her hands. On the present appeal, besides the two subordinate points last mentioned, namely, the grant of a declaratory decree without consequential relief and the bar of limitation, the substantial question which has emerged for consideration is, what was the true nature of the debt created by the bond, of the decree in the bond suit and of the proceedings thereon, and what was the legal effect of the execution sale on the estate in the hands of the widow?

It has been found by the District Judge, in concurrence with the Subordinate Judge, that the money was raised and was applied by the widow for payment of rent to the superior landlord. On this basis, it has been argued that the loan was taken for legal necessity. This contention, in our opinion, is not well founded. The powers of a Hindu widow, in respect of alienation of the estate of her husband, are similar to those of a guardian of an infant, as defined by their Lordships of the Judicial Committee in *Hunoomanpersad* v. *Babooee Moonraj* (8), *Kameswar* v. *Run Bahadur* (9), *Lala Amarnath* v. *Achhan Kuer* (10), *Bhagwat Dyal* v. *Debi Dyal* (11). Consequently a person who claims title under an alienation from her must prove that there was legal necessity for it, that is, such pressure on the estate at the time the loan was taken or the alienation made as justified the act of the widow; he can also protect himself by proof of *bonâ fide* enquiry, and if the fact of such enquiry is established, the real existence of an alleged sufficient and reasonably credited necessity is not a condition-precedent to the validity of his title. In the case before us, there is no proof of *bonâ fide* enquiry by the creditor, and further reference need not consequently be made to this possible aspect of the matter. The question then reduces to this was there legal necessity for the loan? The mere fact that the loan was taken to pay rent and the money raised was applied for that purpose, is clearly not sufficient. It may be conceded that the extreme view taken in *Matiulla* v. *Radhabinodi* (12), and *Radhamohun* v. *Girdhari Lal* (13), namely, that the creditor must not only show that the money was borrowed or required for a necessary purpose, but also that the necessity was attributable to causes beyond the control of the widow, is unsound and cannot be supported on principle; for, as their Lordships of the Judicial Committee pointed out in *Hunoomanpersad* v. *Babooee Moonraj* (8), the creditor is not affected by any precedent mismanagement of the estate, provided that he has not been a party to the misconduct which has produced the danger he helps to avert by

(6) I. L. R. 26 Cal. 285 (1898).
(7) I. L. R. 30 Cal. 550 : s. c. 7 C. W. N. 425 (1903).
(8) 6 M. I. A. 393 ; 18 W. R. 81 (1856).
(9) L. R. 8 I. A. 8 : s. c. I. L. R. 6 Cal. 843 (1880).
(8) 6 M. I. A. 393 ; 18 W. R. 81 (1856).
(10) L. R. 19 I. A. 196 : s. c. I. L. R. 14 All. 420 (1892).
(11) 12 C. W. N. 393 : s. c. L. R. 35 I. A. 48 ; I. L. R. 35 Cal. 420 (1908).
(12) Beng. S. D. A. for 1856, p. 596.
(13) Beng. S. D. A. for 1857, p. 460.

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his loan. On the other hand, the opposite extreme view that the creditor is protected if the money raised has been applied for the benefit of the estate, is equally untenable. The true rule is that the creditor, to protect himself, where he is not shown to have made a *bonâ fide* enquiry, must prove that there was an actual pressure on the estate, such as an outstanding decree, or an impending sale which the widow had no funds capable of meeting. [*Lala Amarnath* v. *Achhan Kuer* (10), *Dharamchand* v. *Bhaoani Misrain* (14), *Sreenath* v. *Rutunmala* (15), *Srimohun* v. *Brij Behary* (16), *Lala Byjnath* v. *Bissen* (17), *Mata Pershad* v. *Bhageeruthee* (18), *Ghanshyam* v. *Badiyala* (19), *Lakshman* v. *Radha Bai* (20).] Tested from this point of view the creditor in the case before us has laid no solid foundation for his claim. We know nothing about the state of the family at the time of the loan, and no explanation has been offered why the widow in possession of a valuable *putni* should have found herself unable to pay even the current rent to the superior landlord. We must hold accordingly that the creditor has not proved legal necessity for the transaction.

Even if we assume, however, that there was legal necessity for the loan, the position of the creditor is beset with inextricable difficulties. Where a Hindu widow obtains a loan, she is at liberty to bind herself personally, or, when the purpose for which she borrowed is a necessary one, she is equally entitled to bind her husband's estate. Whether, in a particular case, the widow intended to bind herself alone or to bind the estate as well, must be gathered from the statement, if any, in the deed, or from the surrounding circumstances: *Damodar* v. *Jankibai* (21), *Prosunna* v. *Umedar Raja* (22). In this respect there is no real distinction in principle between a case where a charge is formally created by the widow, and another where she executes a bond for the money advanced: *Hurry Mohun* v. *Gonesh* (23), *Ramcoomar* v. *Ichamoyi* (24), *Veera* v. *Errappa* (25), *Regalla Jogauya* v. *Venkata* (26), *Veerabadra* v. *Marudaga* (27), *Sakrabhai* v. *Manganlal* (28), *Umrootram* v. *Narayandas* (29), *Devji* v. *Shambhu* (30), although the contrary view has sometimes been maintained, *Ramaswami* v. *Sollatommul* (31), *Narana* v. *Vastera* (32), *Giribala* v. *Srinath* (33), *Prosunna* v. *Umedar Raja* (22), *Gadappa* v. *Appaji* (34), *Dhiraj* v. *Jangan* (35), *Kallu* v. *Faiyaz* (36). It is possible, however, that where a charge has been created by the widow on the estate there may be surer indication of her intention to make the estate liable than where she has executed a promissory note: but once the intention is established, the effect of her act must depend upon

(10) L. R. 19 I. A. 196: s. c. I. L. R. 14 All. 420 (1892).
(14) L. R. 24 I. A. 183: s. c. I. L. R. 25 Cal. 189; 1 C. W. N. 647 (1897).
(15) Beng. S. D. A. for 1859, p. 421.
(16) I. L. R. 36 Cal. 753 (1909).
(17) 19 W. R. 80 (1873)
(18) 2 All. H. C. R. 78 (1870).
(19) I. L. R. 24 All. 547 (1902)
(20) I. L. R. 11 Bom. 609 (1887)
(21) 5 Bom. L. R. 350 (1903).
(22) 13 C. W. N. 363 (1908).
(23) I. L. R. 10 Cal. 823 (1884).
(24) I. L. R. 6 Cal. 36 (1880).
(25) I. L. R. 29 Mad. 484 (1906).
(26) I. L. R. 33 Mad. 492 (1910)
(27) I. L. R. 34 Mad. 188 (1910).
(28) I. L. R. 26 Bom. 206 (1901).
(29) 2 Borr. 223 (1822)
(30) I. L. R. 24 Bom. 135 (1899).
(31) I. L. R. 4 Mad. 375 (1882).
(32) I. L. R. 17 Mad. 208 (1893).
(33) 12 C. W. N. 769 (1908).
(34) I. L. R. 3 Bom. 257 (1879).
(35) I. L. R. 19 All. 300 (1897).
(36) I. L. R. 30 All. 394 (1908).

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the nature of the debt, which is recoverable from the estate in the hands of the reversioner, if it has been incurred for necessary purposes. Tested in the light of these principles, the creditor here is in a precarious position, as there is nothing to indicate that the widow intended to make the estate liable for the loan. The rent was primarily payable out of the income as it accrued, and if by reason of any temporary difficulty, the widow was driven to raise a loan, there is no reason why one should assume, in the absence of clear indication to that effect, that she intended to throw a permanent burden upon the inheritance rather than to repay the loan out of the income for subsequent years which would be absolutely at her disposal. In this connection, we must bear in mind, that as laid down by their Lordships of the Judicial Committee in *Jibankrishna* v. *Brajalal* (7), and by this Court in *Kristo Gobind* v. *Hem Chandra* (37), *Mohammed Sadat Ali* v. *Harasundari* (38), and *Bireswar* v. *Kamal Kumari* (39), a decree for rent, which has accrued due after the death of her husband, is *primâ facie* a personal decree against the widow; although when such a decree has been obtained by the entire body of landlords under the provisions of the Bengal Tenancy Act, the tenure itself may pass into the hands of the purchaser as the result of a sale in execution. Apart from this initial difficulty, there is a graver obstacle in the path of the creditor in the case before us. It is not enough to show that the widow intended to create a liability upon the estate in her hands. The creditor has further to establish that he intended to enforce such liability. The real question in fact is, what was liable to be sold and what in fact was actually sold. In the investigation of this question, the frame of the suit, the judgment, the decree, the execution proceedings, the sale-proclamation, the amount of purchase-money, and the conduct of the parties must all be taken into account; the sale-certificate is by no means conclusive. As the proceeding may be against the widow personally or against the widow as representing her husband's estate, the true test is to see whether the proceedings in which the sale was directed was brought against the widow personally or with a view to affect the whole inheritance. [*Jugal* v. *Jotendra* (40), *Court of Wards* v. *Ramaput Singh* (41), *Srinath* v. *Hari* (42), *Ramlal* v. *Akhoy* (43), *Radhakishen* v. *Naurotan Lal* (44), *Brija* v. *Joggeswar* (45), *Kistomoyee* v *Prosunno* (46), *Bisto Beharee* v. *Byjnath* (47), *Banjun* v. *Brij Bhookan* (48), *Bireswar* v. *Kamal Kumari* (39), *Sadat Ali* v. *Harasundari* (38), *Trilochan* v. *Bakkeswar* (49).] It is not necessary that the reversioner should be joined as party to the suit, but if he is so joined, the fact would afford clear indication that the creditor intended to make the inheritance liable and not to restrict his remedy to the qualified interest of the widow. [*Bhagarathi Das* v. *Baleswar*

(7) I. L. R. 30 Cal. 551 : s. c. 7 C. W. N. 425 (1903).
(37) I. L. R. 16 Cal. 511 (1889).
(38) 16 C. W. N. 1070 (1912).
(39) 17 C. W. N. 337 (1912).

(38) 16 C. W. N. 1070 (1912).
(39) 17 C. W. N 337 (1912).
(40) L. R. 11 I. A. 66 : s. c. I. L. R. 10 Cal 985 (1884).
(41) 14 M. I. A. 605 (1872).
(42) 3 C. W. N. 637 (1899).
(43) 7 C. W. N. 619 (1903).
(44) 6 C. L. J. 490 (1907).
(45) 9 C. L. J. 342 (1909).
(46) 6 W. R. 304 1866).
(47) 16 W. R. 49 (1871).
(48) L. R. 2 I. [illegible] I. L. R. 1 Cal. 133 (1875).
(49) 15 C. L. J. 423 (1910).

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Bagerti (50), *Mohima Chandra* v. *Ramkishore* (5), *Srinath Dass* v. *Haripada* (42), *Nugendra* v. *Kamini* (51), *Lloyd* v. *Johnes* (52); Story on Equity Pleadings, Art. 144.] Tested in the light of these principles what is the position of the creditor in the case before us? There is no indication whatever that in the suit on the money bond he intended to obtain a decree which would operate against the inheritance. The claim was, in form, personally against the widow. The decree, on the face of it, was personally against her. In the execution proceeding, her right, title and interest were put up to sale and were purchased by the decree-holder, who paid for the share of the property now in dispute, one-half of Rs. 745, though the value thereof was according to the Plaintiff not less than Rs. 2,100. What was sold, was, *primâ facie*, her limited interest, and it is impossible for us to hold that the entire inheritance was intended to be and was acually brought to sale. Consequently, the interest acquired by the purchaser terminated on the death of the widow. In this view, it is immaterial that the sale, though voidable because held in contravention of sec. 99 of the Transfer of Property Act, was not avoided by the widow; her omission to do so could not give the sale greater efficacy than it possessed or enlarge the interest acquired by the purchaser thereunder. We hold accordingly that the Plaintiff became entitled to the property on the death of her mother.

It is plain that no question of limitation arises. Whether we apply Art. 120 or Art. 141, the suit is obviously in time.

(5) 23 W. R. 174; 15 B. L. R. 142 (1875).
(42) 3 C. W. N. 687 (1899).
(50) 19 C. L. J. 155: s. c. 17 C. W. N. 877; I. L. R. 41 Cal. 69 (1913).
(51) 11 M. I. A. 241 (267) (1867).
(52) 9 Ves. 37 (57) (1803).

Nor can objection be taken to the grant of a declaratory decree under sec. 42 of the Specific Relief Act. The property is not in the possession of the Defendants and the Plaintiff could not ask for ejectment as against them: *Subramaniya* v. *Paramaswaran* (53), *Malaiyya* v. *Perumal* (54). Nor could she join in this suit the under-tenure-holder who has obtained possession under the Putni Regulation for the satisfaction of his lien; his possession is rightful and the Plaintiff has no cause of action against him. The only question in controversy is, whether on the death of the Plaintiff's mother the property vested in her, or still continues in the hands of the execution purchaser: for the reasons assigned, it has been rightly declared that the property vested in the Plaintiff.

The result is that the decree of the District Judge must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES NOS. 478, 370, 559, 565, 581, 590, 597, 602, 603, AND 657 OF 1910.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 11 and 12, January.
Judgment, 12, January.

BATA MONDAL and anr., Defendants, Appellants,
v
MAHARAJA MANINDRA CHANDRA NANDI BAHADUR, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 29—Class of agreements in kabuliyats *not affected by the section—Sec. 109B, scope of enquiry under—Sec. 106*

An agreement embodied in a kabuliyat *to pay a certain amount of rent agreed upon by the parties in settlement of a*

(53) I. L. R. 11 Mad. 116 (1887).
(54) 21 Mad. L. J. 1022 (1911).

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bonâ fide *dispute regarding the rate of rent and to avoid further litigation is not an agreement in violation of the terms of sec. 29 of the Bengal Tenancy Act.*

The enquiry under sub-sec. (1) of sec. 109B is obviously contemplated in a case where the agreement or compromise has been made for the purpose of settling a dispute, namely, a dispute which the Revenue Officer would be called upon to decide on the merits but for the agreement or compromise. Sec. 109B clearly does not apply to a case, where the contract between the parties was made several years before the settlement proceedings.

These were appeals preferred on the 28th of February 1910 against the decrees of B. C. Mitter, Esq., Special Judge of Zilla Murshidabad, dated the 30th September 1909 and 2nd October 1909, reversing the decrees of Moulvi Mohammad Chainuddin, Settlement Officer at Beldanga, dated the 31st of August 1908.

The material facts of the case will appear from the judgment.

Babus Proras Chandra Mitter and *Kumar Sankar Roy* for the Appellants.

Dr. Rash Behary Ghose, Babus Ram Charan Mitter, Hemendra Nath Sen, Sarat Kumar Mitter and *Jatindra Nath Lahiri* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

S. A. 178 of 1910.

This is an appeal by the Defendants in a suit under sec. 106 of the Bengal Tenancy Act. In the course of proceedings for the preparation of a record-of-rights under Chap. X of the Bengal Tenancy Act, a dispute arose between the landlord and the tenants as to the amount of rent annually payable by the latter. The landlord relied upon a *kabuliyat* executed by the tenants on the 17th April 1893. The *kabuliyat* on the face of it states that the tenants held a definite quantity of land and that they agreed to pay a specified rent in respect of this land. The tenants contended that the *kabuliyat* had been executed in contravention of the provisions of sec. 29 of the Bengal Tenancy Act. To meet this objection, the landlord relied upon an *amanat roka*, in which it was stated by the tenants that there was no certainty of the actual quantity of land and the amount of rent payable in respect thereof at the time when they executed the *kabuliyat*. The Settlement Officer held that the *kabuliyat* was not binding upon the tenants and made an entry in the record-of-rights in their favour, holding that the rent payable by them was the rent they had paid before the *kabuliyat* was executed. The landlord thereupon instituted the present suit for declaration that the tenants were liable to pay rent on the basis of the *kabuliyat* and for amendment of the record-of-rights. The Settlement Officer dismissed the suit : but upon appeal that decision has been reversed by the Special Judge. In this Court, on behalf of the tenants it has been argued that the *kabuliyat* is not binding upon them and an endeavour has been made to distinguish the decisions in *Sheo Sahoy* v. *Ramrachiya* (1) and *Nath Singh* v. *Damri Singh* (2). The Special Judge has found that at the time when the *kabuliyat* was executed, there was a *bonâ fide* dispute between the landlord and the tenants as to the quantity of land and the rent payable in respect thereof. On the basis of this finding, he has held that the *kabuliyat* is not affected by the provisions of sec. 29 of the Bengal Tenancy Act. In our opinion, the view taken by the Special Judge is supported by the decisions mentioned and must be upheld.

(1) I. L. R. 18 Cal. 333 (1891).
(2) I. L. R. 28 Cal 90 (1900).

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There is no room for controversy that the case of *Nath Singh* v. *Damri Singh* (2) is an authority for the proposition that an agreement embodied in a *kabuliyat* to pay a certain amount of rent agreed upon by the parties in settlement of a *bonâ fide* dispute regarding the rate of rent and to avoid further litigation, is not an agreement in violation of the terms of sec. 29 of the Bengal Tenancy Act. A careful examination of the judgments of the learned Judges, who decided that case, has convinced us that this was the proposition they intended to lay down, on the authority of the decision in *Sheo Sahoy* v. *Ramrachiya* (1). With regard to this earlier case, there may be some room for argument that the judgments are possibly ambiguous; there may be a question whether the learned Judges intended to lay down that sec. 29 applied only when the intention of both parties was to effect an enhancement. But it is worthy of note that one of the learned Judges who decided the later case was a party to the earlier decision, and we must accept his view of what he had intended to decide in concurrence with his colleague in the earlier case. We must take it then that the two decisions mentioned are against the contention of the Appellant. There is the further fact that in the case of *Kedar Nath* v. *Maharaja Manindra Chandra Nandy* (3), to which one member of this Bench was a party, an unsuccessful attempt was made to challenge these two decisions, and although some doubt was expressed whether they gave effect to the true intent of the legislature in framing sec. 29, they were followed, possibly not altogether without hesitation and reluctance. After a careful consideration of the elaborate arguments which have been addressed to us on the present occasion we see no adequate reason to dissent from these decisions which have been accepted as good law for a quarter of a century; as will presently be seen, they can be defended upon an intelligible construction of sec. 29 of the Bengal Tenancy Act.

Sec. 29 finds a place in the fifth chapter of the Bengal Tenancy Act among a group of sections which deal with the question of enhancement of rent of an occupying raiyat. Of these, the first, namely, sec. 27 lays down the principle that the rent for the time being payable by an occupancy raiyat shall be presumed to be fair and equitable until the contrary is proved. Sec. 28 then follows with the principle that where an occupancy raiyat pays his rent in money, his rent shall not be enhanced except as provided by the Act. This clearly contemplates an enhancement, where there is an intention to effect an enhancement. Sec. 30 deals with the case of enhancement of rent by suit. It is obvious that an enhancement under this section can be effected, only when there is an intention to effect an enhancement. Sec. 29 which is wedged in between sec. 28 and sec. 30 relates to enhancement of rent by contract, and lays down that the money-rent of an occupancy raiyat may be enhanced by contract, subject to the condition that the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the raiyat. The section consequently deals with the validity of a contract for enhancement of rent. It may be legitimately held that there can be no contract for enhancement of rent, unless both the parties to the contract are agreed upon one point, namely, that there is to be an enhancement of the rent. This does not necessarily imply that the parties are agreed

(1) I. L. R 18 Cal. 333 (1891).
(2) I. L. R. 28 Cal. 90 (1900).
(3) 11 C. L. J. 106 (1909).

as to what is the amount of rent actually payable before the enhancement. To take a concrete illustration : The landlord may assert that the rent payable is Rs. 10; the tenant may assert that the rent payable is Rs. 9. If there is an agreement that the rent in future will be Rs. 11, there is an agreement for enhancement, because both the parties are agreed that the rent payable in future shall be higher than the rent payable in the past, whether we accept the figure for the antecedent rent as asserted by the landlord or as alleged by the tenant. It is thus clear that the operation of sec. 29 may fairly be limited to a case where there is a real contract for enhancement, which cannot ordinarily take place where there is a *bonâ fide* dispute, that is, a serious claim honestly made on the one hand and honestly repudiated on the other, as to the rent payable. Such dispute may be the result of a controversy as to the area of the land or the rate at which it is held, or both these elements. This, we think, is a reasonable construction of sec. 29 of the Bengal Tenancy Act, and, as it has been uniformly adopted ever since 1891, we are not prepared at this distance of time to take a different view. We cannot also overlook the significant fact that although since 1891 the Bengal Tenancy Act has been repeatedly amended, sec. 29 has not been so altered as to negative the decisions mentioned. We must accordingly uphold the decision of the Special Judge that the *kabuliyat* in this case is not invalidated by sec. 29 of the Bengal Tenancy Act.

One further question must be examined, namely, what is the effect of sec. 109B, which was inserted in the Bengal Tenancy Act by Act I of 1907 (B. C.), and did not consequently require consideration in the decision mentioned. Sec. 109B deals with the question of the authority of the Revenue Officer to give effect to agreements or compromises. Sub-sec. (1) provides that in framing a record-of-rights and in deciding disputes under Chap. X, the Revenue Officer shall give effect to any lawful agreement or compromise made or entered into by any landlord and his tenant; but he shall not give effect to any agreement or compromise, the terms of which, if they were embodied in a contract, could not be enforced under the Act. This sub-section clearly contemplates, in the first place, a dispute, and, in the second place, a lawful agreement or compromise in settlement of such dispute. When an agreement or compromise has been reached under these circumstances, the Settlement Officer may give effect to it, but he is debarred from giving effect to it, if it is of a certain description; sub-sec. (2) then provides that where any agreement or compromise has been made for the purpose of settling a dispute as to the rent payable, the Revenue Officer shall, in order to ascertain whether the effect of such agreement or compromise would be to enhance the rent in a manner or to an extent not allowed by sec. 29 in the case of a contract, record evidence as to the rent which was legally payable immediately before the period in respect of which the dispute arose. This enquiry is obviously contemplated in a case where the agreement or compromise has been made for the purpose of settling a dispute, namely, a dispute which the Revenue Officer would be called upon to decide on the merits but for the agreement or compromise. Sec. 109B clearly does not apply to a case of the description now before us, where the contract between the parties was made in 1893, that is, 15 years before the settlement proceedings. Consequently, sec. 109-B is of no avail to the Defendants.

The result is that the decree of the

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Special Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at one gold mohur.

It is conceded that this judgment will govern the other appeals, namely, 370, 559, 565, 581, 590, 597, 602, 603 and 657 of 1910. These appeals, also, are dismissed with costs, one gold mohur in each case.

Appeals dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 3951 OF 1912.

FLETCHER, J.
RICHARDSON, J.
1914,
Heard, 8 and 9, June.
Judgment, 9, June.

ESAHUQ CHOWDHRY, Plaintiff, Appellant,
v.
ABADENNISSA BIBEE, Defendant, Respondent.

Mahomedan Law—Dower-debt, gift made in lieu of, if governed by principle relating to gifts in death-bed illness.

The provisions of the Mahomedan Law applicable to gifts made by persons labouring under a fatal disease do not apply to a so-called gift made in lieu of a dower-debt which is really of the nature of a sale.

This was an appeal preferred on the 17th December 1912 against the decree of Babu Bejoy Gopal Basu, Subordinate Judge of Burdwan, dated the 23rd September 1912, affirming the decree of Babu Achinta Nath Mitra, Munsif of that place, dated the 17th January 1911.

The facts of the case will appear from the judgment.

Babus Dwarka Nath Chuckerbutty, Bepin Behary Ghosh and *Peary Mohan Chatterjee* for the Appellant.

Dr. Rash Behary Ghosh and *Babu Probodh Ch. Dutt* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This is an appeal from a judgment of the learned Subordinate Judge, Second Court of Burdwan, dated the 23rd September 1912, affirming the decision by the Munsif. The suit was brought by the Plaintiffs for a declaration that the *kobala* set up by the Defendant No. 1 was collusive and invalid and not binding upon them. The question that we have got to decide lies within a narrow compass. The Defendant No. 1 is the widow of a Mahomedan gentleman. This Mahomedan gentleman had agreed to pay a certain sum as dower to the said Defendant The dower was deferred dower; but it is the common case—and so found by the learned Subordinate Judge—that a portion of the dower was outstanding at the date of the execution of the *kobala* in question. The deceased gentleman executed a conveyance of this property to the Defendant in satisfaction of her dower-debt A question has been raised before us, whether the principles of the Mahomedan Law, with reference to the death-bed illness which apply to gifts apply also to a sale when the sale is for dower-debt. The matter is not *res integra*. The very matter has already been dealt with in the Allahabad High Court; see *Gulam Mustafa* v. *Hurmat* (1) where the learned Judges held that the provisions of the Mahomedan Law applicable to gifts made by persons labouring under a fatal disease do not apply to a so-called gift made in lieu of a dower-debt which is really of the nature of a sale That case is exactly on all fours with the present, and it has been followed and approved of both by this Court and the Madras High Court. [See *Abbas Ali* v *Karim Baksh* (2), *Bibijanbi*

(1) I. L. R. 2 All 854 (1880).
(2) 13 C. W. N. 160 (1908).

v. *Hazarath Saib* (3).] We are of opinion that, that decision in the case of *Gulam Mustafa* v. *Hurmat* (1) is correct, and we think we ought to follow the same. It does not seem to us from a perusal of the books that have been handed up to us in the course of the argument that the principles relating to a gift apply to a transaction such as the one that is now before us. In our opinion, the learned Judge of the lower Appellate Court came to a correct conclusion. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON, J.— I agree. Case XII, p. 177 of Macnaughten's Mahomedan Law, appears to be distinguishable from the present case, inasmuch as it is not stated there that the sale was in consideration of a dower-debt.

Appeal dismissed.

(1) I. L. R. 2 All 854 (1880).
(3) 21 Mad. L. J. 958 (1911).

[CIVIL REVISIONAL JURISDICTION.]

RULE. NO. 861 OF 1913.

MOOKERJEE, J. BEACHCROFT, J. 1914, 2, February.	ABDUL AZIZ and others, Petitioners, *v.* TAFAZUDDIN SHEIKH & ors., Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 21, r. 90—Sale in execution of decree for arrears of rent—Non-transferable occupancy holding, transferee of a portion of, if entitled to apply for reversal of sale.

A transferee of a portion of a non-transferable occupancy holding is entitled to apply for reversal of a sale in execution of a decree for arrears of rent obtained by the entire body of landlords.

The rule formulated in rule 90 of Or. 21 of the Civil Procedure Code of 1908 has a wider scope and is of a more comprehensive character than the rule laid down in sec. 311 of the Code of 1882.

This was a Rule against a decision of Babu Jogendra Nath Bose, Subordinate Judge, Khulna, dated 20th March 1913, confirming that of Babu Amrita Lal Bannerjee, Munsif, Bagerhat, dated 4th June 1912.

The material facts will appear from the judgment.

Babu Haripada Chatterjee for the Petitioners.

Babu Brojolal Chackrabartty for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

We are invited in this Rule to set aside an order of the Court of first instance, affirmed on appeal by the Subordinate Judge, by which an application presented by the Petitioners under r. 90 of Or. 21 of the Code of Civil Procedure has been rejected on the ground that they had no *locus standi* in the matter. The circumstances under which the application was made are not disputed, and may be briefly recited. The landlords obtained a decree for rent against the recorded tenant of a non-transferable occupancy holding and had it sold by auction on the 11th September 1911. The Petitioners had previously purchased a portion of the holding and had also taken a mortgage of another portion; the two portions thus transferred to the Petitioners do not cover the entire holding. The Petitioner applied to have the sale set aside on the grounds mentioned in r. 90 of Or. 21. To this, the objection was taken that they were not competent to make the application inasmuch as they were not persons whose interests were affected by the sale. The Court of first instance gave effect to this objection on the strength of the decision

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of this Court in the case of *Prosunno Kumar* v. *Bama Charan* (1) and dismissed the application. On appeal by the Applicants, the Subordinate Judge has confirmed the order of the original Court. He has held that there is a conflict of judicial opinion upon this question and that he is bound to follow the latest decision in the reports. This order is now assailed before us and it is argued that the erroneous view taken by the Court of first instance as to the true scope of r. 90 of Or. 21 has led that Court to refuse to exercise a jurisdiction vested in it by law. In our opinion there is no room for serious controversy that the order of the Court of first instance as confirmed by the lower Appellate Court is erroneous and must be set aside.

The most serious mistake into which the Court of first instance has fallen is that there is diversity of judicial opinion upon this question. The cases have been analysed before us and they show that there is no decision which supports the view taken by the Courts below, whereas there are several decisions which support the contention of the Petitioners. No useful purpose could be served by a detailed analysis of the judicial decisions mentioned by the Subordinate Judge they were decided with reference to statutory provisions which have no application to the case before us. We may state briefly that the case of *Azgar Ali* v. *Asaboddin* (2) indicates that in circumstances not distinguishable from those of the present case, it was held that under sec. 311 of the Code of 1882, a transferee of a portion of a non-transferable occupancy holding was entitled to apply for reversal of a sale in execution of a decree for arrears of rent obtained by the entire body of landlords. In three other cases, namely, *Kunja Behari Mandal* v. *Sambhu Chandra Roy* (3), *Benodini Dasi* v. *Peary Mohan Haldar* (4) and *Omar Ali* v. *Basiruddin Ahmad* (5), the right of such a purchaser to apply to have the sale set aside under sec. 310A of the Code of 1882 was affirmed. In two other cases [*Jugalmohini Dasi* v. *Srinath Chatterjee* (6) and *Tarakdas Pal Chaudhury* v. *Harish Chandra Banerjee* (7)], the right of such a transferee to make an application under sub-sec. (3) of sec. 170 of the Bengal Tenancy Act was upheld. In two other decisions [*Barhamdeo Singh* v. *Ramdown Singh* (8) and *Gadadhar Ghose* v. *The Midnapore Zemindary Co.* (9)], the position was supported that a transferee of this description was entitled to maintain a suit to set aside a fraudulent decree which, if not set aside, might be executed and might prejudice his position. The Subordinate Judge was undoubtedly in error when he held that some of the cases mentioned did not support the contention of the Petitioners. If the present case had arisen under the Code of 1882, there is no question that the decisions to which we have referred would have supported the contention of the Petitioners. The Subordinate Judge was equally in error when he held that there are three later decisions which negative the contention of the Petitioners, namely, *Nissa Bibi* v. *Radha Kishore* (10), *Prosunno Kumar* v. *Bama Charan* (1) and *Nalini Behari Roy* v. *Fulmani Dassi* (11): he overlooked the very

(1) 13 C. W. N. 652 (1909).
(2) 9 C. W. N. 134 (1904).

(1) 13 C. W. N. 652 (1909).
(3) 8 C. W. N. 232 (1903).
(4) 8 C. W. N. 55 (1903).
(5) 7 C. L. J. 282 (1908).
(6) 12 C. L. J. 609 (1910).
(7) 17 C. W. N. 163 (1912).
(8) 16 C. L. J. 139 (1908).
(9) 16 C. L. J. 141 (1908).
(10) 11 C. W. N. 312 (1906).
(11) 16 C. W. N. 421 (1912).

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material circumstance that in each of these cases, the entire holding had been transferred. In the first case, it was held that the transferee of a transferable occupancy holding was the representative-in-interest of the tenant, and was entitled to apply under secs. 214 and 311 of the Code of Civil Procedure of 1882 to have the sale set aside. There is a dictum in the judgment to the effect that if the holding were non-transferable, the transferee could not be treated as a representative. This view was followed in the case of *Prosunno Kumar* v. *Bama Charan* (1), while in the case of *Nalini Behari Roy* v. *Fulmani Dassi* (11) the question related to the position of a transferee of an entire non-transferable holding under sub-sec. (3) of sec. 170 of the Bengal Tenancy Act. The distinction between the position of a transferee of a portion of a holding and of an entire holding is fundamental and has been overlooked by the Courts below. If a tenant has transferred his entire holding which is non-transferable and has surrendered possession to the transferee, he has in essence abandoned the holding. The tenancy has terminated, and the landlord has become entitled to re-enter. On the other hand, if a portion only of the holding has been transferred, even though the holding be non-transferable, there is no forfeiture. The tenancy still subsists, and the landlord is entitled to look to his tenant for payment of rent: *Kabil Sardar* v. *Chandra Nath Nag Chaudhury* (12), *Durga Prosad Sen* v. *Dowla Gazee* (13) and *Gazaffer Hossain* v. *E. Dalglish* (14). It is plain, therefore, that if the Code of 1882 applied to the present case, as the Subordinate Judge assumed that it did, the Petitioners would be entitled, upon elementary principles as also on well-established authorities, to maintain the application under sec. 311 of the Code of Civil Procedure. But the Subordinate Judge has overlooked that by the legislation of 1908 a fundamental alteration has been made in the law. In sec. 311 of the Code of 1882 it was provided that the decree-holder, or any person whose immoveable property has been sold in execution, may apply to the Court to set aside the sale on the ground of material irregularity in publishing or conducting it. It was ruled by a Full Bench of this Court in the case of *Pareshnath* v. *Nabogopal* (15) with reference to sec. 310A that the expression "any person whose immoveable property is sold" includes every person who has an interest in the property whether qualified, partial, or absolute, provided such interest is affected by the sale. In the present Code, r. 90 provides that where immoveable property has been sold in execution of a decree, the decree-holder or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale may apply to the Court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it. If we contrast this with the language used in r. 89, we find that there is remarkable variance between the two rules.

R. 89 contemplates an application by persons either owning the property which has been sold in execution or holding an interest therein by virtue of a title acquired before such sale. It is improbable that this divergence in language is merely accidental. The expression "a person whose interests are affected by the sale" has obviously a wider import than the ex-

(1) 13 C. W. N. 652 (1909).
(11) 16 C. W. N. 421 (1912).
(12) I. L. R. 20 Cal. 590 (1892).
(13) 1 C. W. N. 160 (1894).
(14) 1 C. W. N. 162 (1896).

(15) I. L. R. 29 Cal. 1: s. c. 5 C. W. N. 821 (1901).

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pression "a person holding an interest in the property sold". It is not difficult to imagine cases in which the interests of a person may be affected by an execution sale, though it may be difficult to maintain that he has an interest in the property sold. Under these circumstances, we are of opinion that the rule formulated in r. 90 of Or. 21, of the Code of 1908, has a wider scope, and is of a more comprehensive character than the rule laid down in sec. 311 of the Code of 1882, and that the present case falls within the scope of r. 90.

The result is that this Rule is made absolute and the orders of the Courts below set aside. The case will be remitted to the Court of first instance for investigation on the merits. The Petitioners are entitled to their costs throughout the present proceedings. We assess the hearing fee in this Court at three gold mohurs.

Rule made absolute.

[CIVIL REVISIONAL JURISDICTION]

RULE NO. 679 OF 1914.

HOLMWOOD, J.
RICHARDSON, J.
1914,
17, August.

PRASANNO KUMAR CHUCKERBUTTY & anr., Defendants, Petitioners,
v.
PROKASH CH. DUTT, Plaintiff, Opposite Party.

Bail-bond—Forfeiture on failure of accused to appear—Suit by surety against third person upon promise to indemnify—Contract, legality of.

A bail-bond having been forfeited owing to the failure of the accused to appear, the surety sued a third person who had agreed to indemnify the surety for recovery of the amount forfeited.

Held—*That the contract to indemnify was illegal and could not be enforced.*

This was a Rule granted on the 19th June 1914 against the judgment and decree of Babu Debendra Bejoy Bose, Subordinate Judge, 1st Court, Burdwan, passed in the exercise of his powers of a Court of Small Causes, dated the 23rd March 1914.

The facts of the case were as follows :—

The Plaintiff, a Mukhtear in the Criminal Court of Burdwan, stood surety for appearance of the accused in a criminal case and gave a bail-bond for Rs. 100 each in respect of each accused. He did so at the request of the Defendants and on the latter agreeing to make good the Plaintiff's loss, if they failed to produce the accused who were his men, and if on that ground the bail-bond were forfeited. The three accused did not appear and the bail-bonds were forfeited and the Plaintiff had to pay Rs. 700 owing to the failure of the Defendants to produce the accused. He thereupon brought this suit. The Defendants denied the Plaintiff's allegations and pleaded that they were not in any way liable.

The Subordinate Judge found on the evidence that the Defendants had in fact agreed to make good the Plaintiff's loss, and that as the accused did not appear the bonds were forfeited, and further that the Plaintiff did not himself know the accused. On these findings he decreed the suit.

The Defendant thereupon moved the High Court and obtained this Rule.

Dr. Dwarka Nath Mitter and *Babu Nirmal Chandra Chandra* for the Petitioners.

Babu Karunamoy Bose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule must be made absolute on the ground on which it was issued. The principle laid down by North, J., in the case of *Consolidated Exploration and Finance*

Co. v. *Musgrave* (1) has been applied in this country both by the Punjab and Allahabad Courts and obviously must apply in every country where English criminal justice is administered. The principle is that it is essential that the person giving bail should be interested in looking after and, if necessary, exercising the legal powers he has to prevent the accused from disappearing. This is essential for the protection of the public, and anything that tends to prevent or hinder his so doing is illegal. Why is it not equally illegal for the bail to be indemnified by a third person, it being admittedly illegal to be indemnified by the prisoner? The reason of the illegality is the same in each case. Therefore the Opposite Party cannot escape by saying that he contracted with a third party.

The decree of the lower Court must be set aside and the Plaintiff's suit dismissed without costs in any Court.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 634 OF 1914.

FLETCHER, J.
BEACHCROFT, J.
1914,
Heard, 2 and
5, November.
Judgment,
5, November.

HARE KRISHNA, Appellant,
v.
THE KING-EMPEROR.

Evidence, greater part of which found to be false, propriety of relying on—Indian Penal Code (Act XLV of 1860), secs 330, 348.

Where in a case under secs. 348 and 330, I. P. C., the Sessions Judge disbelieved all the witnesses in the case, but selected without any corroboration certain passages from the evidence which he believed gave the correct story and, on his own estimate as to whether that story was true or not, convicted the accused :

Held—*That the conviction could not be sustained.*

This was an appeal preferred on the 1st September 1914 against an order of S. B. Dhavle, Esq., Sessions Judge of Cuttack, dated the 5th August 1914.

The material facts sufficiently appear from the judgment.

Babus Dasarathi Sanyal and *Debendra N. Bhattacharji* for the Accused.

Mr. Sultan Ahmad for the Crown.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—The Applicant before us Hare Krishna, *alias* Hari Misra, was tried along with three other persons before the learned Sessions Judge of Cuttack with the aid of Assessors for having committed certain offences under secs. 348 and 330, I. P. C. The Assessors came to the conclusion that none of the accused was guilty. The learned Judge agreeing with the Assessors with regard to three of the accused, acquitted them but disagreeing with the Assessors with regard to the Appellant before us convicted him and sentenced him to undergo 18 months' rigorous imprisonment. This is the interpretation placed by the learned Judge on the opinion of the Assessors. It may, however, be said that in the opinion of one of the Assessors as would appear from the record all four accused were guilty of wrongful confinement. The Appellant before us is a youngman, aged about 20 years, who is said to be a student apparently studying Sanskrit with a view ultimately to becoming a *pandit*.

The case is really an extraordinary one on the evidence, because the learned Judge

(1) [1910] 1 Ch. 87.

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has disbelieved all the witnesses in the case. In fact he described them as liars of varying degrees. But he has selected without any corroboration at all certain passages from the evidence which he believed to be the correct story; and on his own estimate as to whether that story is true or not he has convicted the Appellant before us.

Now, in a case like this it is obvious that opinions of Assessors are entitled to considerable weight. They are gentlemen of the neighbourhood, knowing the language and habit of the people. Their opinion was that a portion of the case was not proved as against any of the accused. As regards the remainder of the case it may be that they differed in their opinions.

Now the story itself is also an extraordinary one. Two of the accused, namely, Kunja and the Appellant before us were uncle and nephew living together jointly. The two other accused Radha Gobinda and Krista were also members of a joint family. These two families were apparently on terms of intimate friendship; and the story told is that certain alterations were being made in one of the rooms in the house of one of these two families and that the two Complainants Narsing and Moni were engaged in doing certain excavations, and on the 7th May last, it is alleged, Narsing, one of the Complainants, found in the course of his work a small earthenware vessel which was believed by Hari to contain treasure. The men at mid-day are said to have been kept from going to take their usual bath and refreshment and later on in the day they were alleged to have been tortured by having crow-bars which had been heated placed against various parts of their skin. One of them is said to have been incapacitated for a certain length of time. That shortly is the nature of the complaint. The medical evidence certainly shows that there were some marks upon these two Complainants. But the difficulty on the medical evidence is, again, that it does not altogether corroborate the story of the witnesses whom the learned Judge has stated to be liars; because the medical evidence is that these injuries on the bodies of the two Complainants had been caused not less than 72 hours before the time when the doctor saw them. As a matter of fact these injuries, if the story told is a true one, had been caused considerably less than 72 hours before they were seen by the doctor. Of course in an ordinary case one might not pay much attention to the opinion of a doctor on a matter like that. But when the direct evidence is disbelieved by the Judge or rather when the witnesses who gave the direct evidence were disbelieved by the Judge, it is a matter of importance that the medical evidence tends further to throw doubt upon the story as told by the witnesses. The other witness who is said to corroborate in part the story told by the Complainant is the wife of Moni Kamali. She again was believed not to be a truthful witness by the learned Judge. Personally I do not remember ever having seen a man convicted on evidence of the nature of what the learned Judge describes as that of liars without any corroboration at all. It seems to me a dangerous precedent to convict a man on evidence of people who were found to be untruthful without any corroboration. I think under the circumstances the case is much too doubtful for us to support the conviction passed solely on evidence of this nature, and we ought to allow this appeal of the accused and set aside the conviction and sentence passed upon him.

BEACHCROFT, J.—I agree that the conviction based on the evidence of persons, the greater part of whose evidence has been found to be false by the learned Judge,

cannot be sustained, especially in view of the great delay in lodging information, a delay for which no adequate explanation had been given.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

Rev. No. 1151 of 1914.

Jenkins, C. J.
Teunon, J.
1914,
9, September.

Sarojebashini Debi, 1st Party, Petitioner,

Sripati Charan Chowdhry & ors., 2nd Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 133, 137—Proceeding when can be dropped without taking evidence when Opposite Party shows cause—*Res judicata, *applicability of the doctrine of.

Where in a proceeding under sec. 133, Cr. P. C., in respect of an alleged obstruction of a public way, the Magistrate made a conditional order but dropped the proceeding on the Opposite Party taking the objection in showing cause that the Court had no jurisdiction to proceed with the enquiry on the ground that the identical way had previously been the subject-matter of an enquiry under sec. 133, Cr. P. C., by a Court of competent jurisdiction:

Held—*That the Magistrate was bound to follow the procedure prescribed by sec. 137, cl. 1, it being open to the Magistrate after taking evidence under that section to consider whether there was a complete answer to the case against the Opposite Party or whether the case was one where the parties should be referred to the Civil Court for the determination of a matter which the Magistrate considered he could not decide.*

That on the facts of the case there was no room for the application of the doctrine of res judicata.

This was a Rule granted on the 6th July 1914 against an order of Mr. A. Dutta, Sub-divisional Magistrate of Basirhat, dated the 28th April 1914, dropping the proceedings taken under sec. 133, Cr. P. C., an application for the revision of which order was rejected by Mr. H. P. Duval, Sessions Judge of the 24-Parganas, on the 4th June 1914.

In this case the Magistrate made a conditional order under sec. 133, Cr. P. C., in respect of an alleged obstruction of a public way. The Opposite Party appeared before the Magistrate, showed cause and took an objection to the jurisdiction of the Court, whereupon the Magistrate without taking any evidence dropped the proceeding. The nature of the objection taken will appear from the following order of the Magistrate:

> Objection has been taken by the Opposite Party on the ground that the Court has no jurisdiction to entertain this proceeding under sec. 133, Cr. P. C., on the ground that this identical pathway formed the subject-matter of an enquiry under sec. 133, Cr. P. C., by this Court the Court of the District Magistrate exercising concurrent jurisdiction in the matter and a judgment was recorded by such Court and that while such judgment is in force, the Court has no jurisdiction to proceed with regard to the identical subject of dispute. It is contended on behalf of the Petitioner that the previous finding did not amount to judgment inasmuch as no evidence was recorded and hence there is no bar to fresh proceeding. I would think that if the enquiry in the previous cases had been made, under sec. 137, Cr. P. C., recording of evidence was no doubt imperative. The law as contained in this sec. 137, Cr. P. C., leaves no option to the Magistrate with regard to the recording of evidence when the person proceeded against appears and

shows cause against the conditional order under sec. 133, Cr. P. C. If in such a case no evidence had been recorded, the order would not have amounted to a judgment. But in the present case no conditional order under sec. 133, Cr. P. C., appears to have been passed and the inquiry had not reached the stage when the recording of evidence was imperative under the law, under sec. 137, Cr. P. C. The Court simply appears to have made a preliminary enquiry if the allegation of the Opposite Party was a *bonâ fide* one or a pretext to oust the jurisdiction of the Court. Such an enquiry appears to have been made under sec. 133, Cr. P. C., cl. (1). There is no provision in the law that the recording of evidence was imperative in a preliminary inquiry under sec. 133, Cr. P. C., and hence I think the order in the previous cases amounted to a judgment. Judicial proceeding as defined in sec. 4 (*m*), Cr. P. C., 'includes any proceeding in the course of which evidence is or may be legally taken on oath.' Hence the order passed was a judicial proceeding and as the Court considered the *bonâ fides* of the allegation, I think it amounted to a judgment. Hence so long that judgment remains in force, I do not think this Court has jurisdiction to entertain this proceeding. The proceeding is therefore dropped."

Babus Dasarathi Sanyal and *Debendra Narayan Bhuttacharjee* for the Petitioner.

Babus Atulya Charan Bose and *Dwijendra Nath Mukerjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The proceedings which are called in question by the Rule now under consideration arise out of action taken by the Magistrate under Chap. X of the Code of Criminal Procedure. Sec. 133 provides that whenever a Magistrate of the qualifications there described considers, on receiving a police report or other information and on taking such evidence, if any, as he thinks fit, that any unlawful obstruction shall be removed from any way used by the public, he may make a conditional order of the nature described in the section and may call upon the person affected to appear before himself and move to have the order set aside or modified. Here it appeared to the Magistrate that there was a public nuisance coming within the terms of that section and the nature of the nuisance was an unlawful obstruction of a way used by the public. He accordingly made a conditional order. The person affected undoubtedly appeared and showed cause, but notwithstanding that the Magistrate has allowed the proceedings to drop, without following the procedure prescribed by sec. 137, cl. 1. It is this omission on the part of the Magistrate that has led to the Rule being granted calling upon the Opposite Party to show cause why the order complained of should not be set aside and such other and further order made as to this Court might seem fit.

We have been assured that there is a large number of cases which are in the direction of sanctioning what the Magistrate has done, though even the authorities do not go quite the length that he has. But whatever may have been decided, we cannot escape from the words of the Legislature until we are told by some higher authorities that we must. The legislature in the event that has happened has directed that the Magistrate shall take evidence in the matter as in a summons case, and in so far as he has failed to do that, he has not performed the duty cast upon him by law. It appears to me that the rule is rightly conceived. It is said that it is open to the Magistrate to consider whether the claim by the Opposite Party in dero-

gation of this asserted public right affords an answer or not. But in deciding that sec. 137 must be followed. We in no way deprive the Opposite Party of his right to show that the terms of sec. 133 do not apply or say that the Court should not apply them, in the particular circumstances of the case, either by reason of real doubt as to the applicability of the section or otherwise. All we have to say is that the Magistrate having taken such measures as make the provisions of sec. 137 applicable, those provisions must be observed.

Therefore, we must make the Rule absolute and direct the case to go back to the Magistrate in order that he shall take evidence in the matter as in a summons case in the manner provided by sec. 137. It will be open to him, as I have indicated, to consider, when that evidence is taken, whether there is a complete answer to the case against the Opposite Party or whether this is not a proper case where the parties should be referred to the Civil Court for the purpose of determining a matter which for some reason or other the Magistrate considers that he cannot decide. But in saying that I do not wish to encourage the idea that the Magistrate should endeavour to escape from dealing with matters which legitimately fall within his jurisdiction.

There is one further matter that has been pressed upon us. It is that these proceedings are in some measure barred by the doctrine of *res judicata*. We are not satisfied that there is any room on the facts of this case for the application of this doctrine.

TEUNON, J.—I agree.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION]

REV. No. 373 OF 1913.

IMAM, J.
CHAPMAN, J.
1913,
17, April.

PURNA CHANDRA MOULIK, Petitioner,
v.
DENGAR CHANDRA PAL, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 247—Death of Complainant, effect of, in a summons case—Substitution of relative of Complainant

In a case under sec. 352, I. P. C., after the death of the Complainant his nephew applied for substitution of his name in place of the deceased. The Magistrate directed the case to be proceeded with, the ground assigned being that the accused had been guilty of the contempt of the process of the Court.

Held- *That it was not a sufficient ground and the Magistrate should have recorded an order of acquittal under sec. 247, Cr. P. C.*

This was a rule granted on the 11th of March 1913 against the proceedings under sec. 352, I. P. C., pending in the Court of the Sub-Deputy Magistrate of Madaripur.

One Dengar Chandra Pal filed a petition of complaint before the Magistrate alleging that the Petitioner had entered his shop, pushed him by the neck and beaten him with shoes and praying that the accused might be summoned for trial of offence under secs. 448, 352 and 323, I. P. C.

The Magistrate summoned the Petitioner under sec. 352, I. P. C.

Dengar Chandra Pal died some time in December 1912. After his death one Bisseshur Pal, a nephew of the deceased, made an application asking for permission to go on with the case on behalf of the deceased. No order appears to have been passed thereon, though the case was adjourned to 18th January 1913.

The accused filed a petition in which

PURNA CHANDRA MOULIK *v.* DENGAR CHANDRA PAL.

it was expressly pointed out that as the Complainant was dead, the case could not go on. On the day of hearing the same objection was raised, but the Magistrate disallowed the same and directed the case to be proceeded with. The only ground assigned by the Magistrate for going on with the case was that the accused had been guilty of the contempt of the process of the Court.

Against the Magistrate's order the Petitioner moved the Sessions Court which by its order, dated 26th February 1913, refused to interfere.

The Petitioner moved the High Court and obtained the present Rule.

Babu Gunoda Charan Sen for the Petitioner.

The JUDGMENT OF THE COURT was as follows:

This was a Rule calling on the District Magistrate of Faridpur to show cause why the proceedings in this case should not be dropped.

The man, on whose complaint the prosecution was started, died and, on his death, his nephew, one Bisseshur Paul, applied to be substituted in place of his deceased uncle.

The case is one under sec. 352, I. P. C., which is compoundable; and we see no reason for the substitution of Bisseshur in place of the deceased Complainant. An order under sec. 247 ought to have been passed by the Magistrate on the failure of the Complainant to appear at the hearing of the case, and sec. 247 empowers the Magistrate to acquit the accused person, unless for some reason he thinks proper to adjourn the case to some other day. The only ground on which the learned Magistrate has chosen to proceed with the case is that the accused had been guilty of the contempt of the process of the Court and he has considered that a good ground.

To our mind, it is not a sufficient ground. The accused is acquitted and the Rule is made absolute.

Rule made absolute.

[CRIMINAL REFERENCE.]

REF. No 174 OF 1914.

JENKINS, C. J.
TEUNON, J.
1914,
9, September.

THE EMPEROR
v.
SARATH and others,
Accused.

Criminal Procedure Code (Act V of 1898), sec. 208—Enquiry preliminary to commitment—Evidence which Magistrate is bound to take—Effect of application for summoning witnesses and filing documents on date on which commitment is made.

In an enquiry preliminary to commitment to the Court of Sessions, after the examination and cross-examination of the witnesses for the prosecution the Magistrate fixed a date for passing necessary orders on going through the record. On this date an application was filed on behalf of the accused for a reasonable time for filing some documents and summoning some witnesses. This application was rejected. On the same day, the accused were committed to the Sessions.

Held: *That there was no contravention of sec. 208. The first paragraph of the section only requires that the Magistrate should hear all the evidence produced before him.*

KING-EMPRESS *v.* AHMAD (2), *approved.*

EMPEROR *v.* MUHAMMAD HADI (1), *explained.*

This was a reference under sec. 438, Cr. P. C., made by Mr. N. K. Dutt, Sessions Judge of Purnea, on the 18th July 1914, recommending that the order of the

(1) I. L. R. 26 All. 177 (1903).
(2) I. L. R. 20 All 264 (1898)

THE EMPEROR *v.* SARATH.

Sub-divisional Magistrate of Kishorganj, dated the 18th June 1914, committing the accused to take their trial in the Court of Sessions under sec. 304, read with sec. 149, I. P. C., be quashed for the reasons set out in the order of reference.

The letter of reference was as follows :—

At the enquiry, prosecution witnesses were examined and cross-examined, and the prosecution witnesses were finished on 17th June 1914, and the Court passed the following order : "I shall go through the record and pass necessary orders to-morrow". On the following day, that is, on 18th June 1914 a petition on behalf of the accused was filed praying for examination of a few witnesses on behalf of the accused and for summoning the witnesses, a list of whom was to be filed at once, and to allow a reasonable time for filing documents. The Court ordered as follows :

"Accused are committed to the Court of Sessions to-day. No further adjournment can be allowed."

I think the order of commitment was wholly illegal. Under sec. 208, sub-sec. (1), Cr. P. C., it was imperative upon the Magistrate to take all evidence as might be produced on behalf of the accused, and under the same section, sub-sec. (3), the Magistrate should issue process to compel attendance of any witness or the production of any document, if the prosecution or accused applies for the same, unless for reasons to be recorded he deems it unnecessary to do so.

The Magistrate cannot refuse to issue summons to compel the attendance of witnesses, because he thinks that the case must be committed to the Sessions, he should weigh the evidence of both sides that might be adduced.

If he considers that the accused should be discharged on the evidence adduced on behalf of the prosecution, or if he thinks that the accused is guilty of grave laches in praying for summoning of witnesses and for such other reason to be recorded, he may refuse to summon witnesses for the defence.

It might be that after examining the witnesses for the defence and considering the documents filed on behalf of the accused, the Magistrate might come to the conclusion that the accused committed no offence or committed an offence that should not be tried by the Court of Sessions.

So in this case the Magistrate was bound to issue summons to compel the attendance of witnesses on behalf of the accused under sec. 208, Cr. P. C. As he did not do so, the order of commitment was wholly illegal. The case of *Emperor* v. *Muhammad Hadi* (1) supports this view. The case of *Phanindra Nath* v. *Emperor* (3), cited by the Public Prosecutor, is not in point, as the accused in that case did not care to cross-examine the witnesses for the prosecution as their examination went on.

So I think the order of commitment was illegal and I therefore recommend that it may be quashed by the Hon'ble High Court under sec. 215 of the Cr. P. C.

Mr. K. N. Chaudhuri and *Babu Manmatha Nath Mukherjee* for the accused.

None for the Crown.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This is a reference to the High Court by the Sessions Judge of Purnea under sec. 438 of the Criminal Procedure Code, and the suggestion is that the law as prescribed in sec. 208 of the Criminal Procedure Code has not been observed. That view has been supported before us by Mr. Chaudhuri who has cited

(1) I. L. R. 26 All. 177 (1903).

(3) I. L. R. 36 Cal 48 (1908).

THE

Calcutta Weekly Notes.

Vol. XIX.] MONDAY, FEBRUARY 8 1915. [No. 12.

Contents.

NOTES.

Criminal Sessions.

The first Calcutta Criminal Session of the present year commences its sittings from date, Mr. Justice Fletcher presiding.

Calcutta Improvement Act Amendment Bill.

The Bill introduced in the Bengal Legislative Council to amend the Calcutta Improvement Act is of considerable importance. The Improvement Act was passed in 1911, and the Calcutta Improvement Trust commenced work in January 1912, and it has been found necessary to amend the Act two years after the date of its enactment. As the law now stands the Improvement Trust have no control over prospective lines of roads within the Calcutta Municipality until a road scheme has been finally approved and the land acquired. It is proposed in the Bill to amend sec. 63 of the Improvement Trust Act, so as to extend to Calcutta itself the power which the Trust now exercise only in the vicinity of Calcutta in respect of preparing schemes and plans of proposed streets and regulating building operations on the land shown in them when the plans have been duly sanctioned. This power which it is proposed to give to the Trust is now exercised by the General Committee of the Corporation of Calcutta, but evidently Government is of opinion that the control over the whole proceedings should be vested in a single authority.

The Hon'ble Mover of the Bill in introducing it said—"It is essential that the operations of the Trust should not discourage private enterprise; it is equally essential that private enterprise should not cause undue interference with the future working of the Trust. . . The preparation of a programme for the future gives them (the Trust) no power of interference with building operations on the land concerned, nor does it give the public any assurance that the alignments proposed will not eventually be modified or that the execution of the project will not be long delayed."

The change which is sought to be made is perhaps necessary for the efficient administration of the Trust, but the Bill undoubtedly involves much controversial matter, and the public should have the fullest opportunity of discussing the provisions of the Bill before it is passed into law.

Purchase of war ships by neutrals from a belligerent.

The last number of the *Law Magazine and Review* takes the same view of the purchase of war-ships by neutrals as we did at the time of the alleged sale of *Göeben* and *Breslau* to the Turkish Government by Germany. There is no legal disability to the sale and purchase, but the whole question turns on the *boná fides* of the transaction. This is what our contemporary says:—

> It is impossible to quarrel with the purchase by Turkey of war-ships from Germany. She is at liberty to buy her navy where she likes provided the transaction is *bonâ fide*. The many cases in which purchases from an enemy in war-time have been disregarded are all cases of merchant-ships, in which the vessel, after sale, was still carrying on the enemy's trade as before.
>
> One can hardly accept the suggestion that the case of *The Minerva* is in any way applicable. There, the refugee man-of-war was taken up by the neutral sovereign (Count Bentinck of Oldenburg) to be used in trade, and probably, in the enemy trade in which formerly she had been employed. In such cases as that of the *Göeben*, it is not the case that the enemy is relieved from the consequences of his vessel's predicament. That predicament results in the neutral obtaining an expensive ship extremely cheap.

The juridical position of Egypt.

In our last issue we said that the abrogation of the Turkish suzerainty over Egypt will result in the abolition of the Consular Courts in Egypt, of which there are three besides the Court of Appeal therefrom. The *Law Journal* to hand by the last mail confirms our view, but says this will not be done before the termination of the present war. Our contemporary reviews the juridical position of Egypt in the following terms :—

The establishment of the English Protectorate over Egypt, and the abrogation of the Ottoman suzerainty, regularise a situation which for over thirty years has been a judicial anomaly. Since the military occupation in 1883, England has been the virtual controller of the country, but in law Egypt has remained an autonomous province of the Ottoman Empire ; her subjects have been Ottoman ; her legal and judicial system has been complicated by the Capitulations conceded to Christian Powers by Turkish Sultans ; her legislative and taxing powers over foreigners resident in her borders have been gravely restricted by the same fetters ; and her progress, remarkable as it is, has been crippled by the fiction of Turkish overlordship, with the consequential European immunities. During recent years indeed, the vassalage has been reduced to very low terms in regard to international relations. In the Crimean War Egypt duly sent her contingent to help the suzerain Power ; in the Turco-Greek War of 1897 she contented herself with withdrawing the exequaturs of the Greek consuls, and took no part in the fighting ; in the Tripoli and Balkan Wars she was strictly neutral, and enforced punctiliously against Turkey the respect due to her neutrality. At the outbreak of the present war she issued a statement as to her relations with Germany and Austria, which involved her in a state of war with those countries, by interdicting all intercourse between her inhabitants and those of the enemy countries, and by permitting acts of belligerent capture in her territorial waters and ports. Thus Egypt had in practice achieved the right to pursue her own policy of peace and war independently of the suzerain Power, before the struggle began between that Power and England. It then, however, clearly became necessary to cut the Gordian knot of fact and fiction, and the proclamation of the Protectorate has put on a rational basis what was becoming a farcical situation. Egyptians become members of a separate nationality under the protection of His Majesty's Government, wherever they may be ; the responsibility of the real protector is made explicit ; the impossible tie with the nominal suzerain is severed. But what is of more importance than the immediate regularisation of the position in war is the ultimate change in the status of Egypt in peace in her relations with other Powers. The Capitulations and all the anomalous immunities which foreigners enjoy under them, and which hamper the good administration of the proper legal development of the country, will now be swept away, or so revised as to offer no obstacle to uniform legislation and a uniform judiciary. British justice will be the guarantee of public and private security, as in the rest of the British Empire. The re-arrangement of the Courts is to be left till the end of the war, but in the meantime another notable opportunity is afforded to the English jurists to frame a scheme of laws—a new *jus gentium*—which shall take the place of the present multiplicity of legal systems.

Reviews.

A COMMENTARY ON THE LAW OF INSOLVENCY IN BRITISH INDIA outside the Presidency Towns and Rangoon (*with the Provincial Insolvency Act, 1907, and the Rules thereunder by the High Court at Fort William in Bengal*). *By E. G. Drake-Brockman, I.C.S. Calcutta and Simla : Thacker, Spink & Co. 1914. Price Rs. 4.*

This is an excellent little publication which does not follow the orthodox method of annotating Indian Statutes. It divides the whole subject logically into parts, and states the law bearing on each in the author's own words with references to the sections of the Provincial Insolvency Act and relevant English and Indian decisions. The Act itself and the Calcutta High Court Rules are printed at the end for reference. In other words, it is a treatise on the law to which the Act is added as a convenient appendix, and not a case-noted edition thereof. This mode of treatment has obvious advantages in the case of an Act with which even Judges and professional men in the Mofussil are notoriously unfamiliar. The statement of the law everywhere is lucid, coherent and pointed. The references are judiciously selected, so far as English cases are concerned, and exhaustive as regards Indian cases. References in the Act portion to the cognate passages of the Commentaries would perhaps have made the book more convenient for use to practising lawyers, but this requirement is partly fulfilled by the index which gives references to both portions. Its handy size and get-up are not the least commendable features of the book.

THE INDIAN LAW OF CRIMES—in two Volumes. Vol. I. *By Tarapada Bannerjee, B. L., Vakil, High Court, and S. C. Mukerji, M. A., B. L., Vakil, High Court, Calcutta. Published by Messrs. R. Cambrey & Co., 9, Hastings Street, Calcutta.*

After the death of the late Mr. Tarapada Bannerjee the second edition of his Indian Penal Code was placed in the hands of the present Editor, Mr. S. C. Mukerji, for revision. In proceeding to revise the book, Mr. Mukerji has re-written the present work from beginning to end on a plan which makes this work, to all intents and purposes, a new book. The author has in his annotation omitted the statement of

facts of cases referred to as the statement of the facts of cases referred to can never dispense with the necessity for consulting the original reports. The present editor has in this view given only the points decided in cases quoted by him. The notes seem to be succinct, well-arranged and full. The author's analysis of the points decided in each case ought to be useful to the profession. The get-up of the volume is also satisfactory.

Notes of Cases.

ENGLISH LAW COURTS.

HOUSE OF LORDS.—Before THE LORD CHANCELLOR and LORDS DUNEDIN, ATKINSON, PARKER and PARMOOR. *Jureidini* v. *National British and Irish Millers' Insurance Co., Ld.* 15th December 1914.

Contract of insurance with a clause providing for arbitration as condition-precedent to any right of action—Effect of repudiation of the contract which went to the root of the contract on the arbitration clause.

This was an appeal from a decision of the Court of Appeal. The Appellant's firm were wholesale dealers in hardware, and had their stock-in-trade insured against loss or damage by fire with the Respondents.

The policy effected with the Respondents provided, by cl. 12, *inter alia*, that if the claim should be in any respect fraudulent or if the loss or damage should be caused by the wilful act or with the connivance of the insured all benefit under the policy should be forfeited. Cl. 17 provided that if any difference arose as to the amount of any such loss or damage, such difference should, independently of all other questions, be referred to the decision of a single arbitrator and in case of disagreement to the decision of two arbitrators and an umpire, and it was thereby expressly stipulated and declared that it should be a condition-precedent to any right of action upon the policy that the award of such arbitrator, arbitrators or umpire of the amount of the loss or damage, if disputed, should be first obtained.

In 1910, all the goods of the Appellant's firm were destroyed by fire, and notice of the fire and loss was given. After a long correspondence the Respondents, by their Solicitors by a letter of 18th November 1910, disputed the claim on the ground of arson. The Appellant sued and the Respondents pleaded that the claim was fraudulent and that the premises had been wilfully set on fire, by or with the connivance of the Appellant's firm, and also that arbitration was a condition-precedent to any right of action on the policy. Darling, J., held that the claim was not fraudulent and entered judgment for the Plaintiff.

The Court of Appeal (Lords Justices Vaughan Williams, Farwell, and Kennedy) reversed the judgment of Mr. Justice Darling on the ground that no action was maintainable until there had been an arbitration to assess the amount of the damage.

The Court allowed the appeal.

The present appeal was preferred therefrom. The LORD CHANCELLOR said that the Appellant's firm made a claim under their policy for the loss caused by the fire. The Respondents took up the position that the loss was caused by the felonious act of the claimants; they charged them with arson, and said that the claim was fraudulent. That was obviously a case which went to the very root of the matter, because cl. 12 said that in such a case all benefit under the policy was to be forfeited. That attitude was again taken up by the Respondents after action brought and the same ground was relied on as a defence to the action. No doubt it was true that the policy contained an arbitration clause as to amount with an express stipulation that the going to arbitration was a condition-precedent. If that had been all and this action had been brought, then both on principle and on authority the claim could not have been maintained without fulfilling the conditions of the policy, because by the law of this country a man might make most contracts he desired to, and among others that he should not come under any liability under a contract unless and until that liability had been defined in a particular way by an arbitrator, and *Scott* v. *Avery* [(1855) 5 H. L. C., 811] had declared that to be the law. But in that case a plea had been put in alleging that the action was not maintainable. That plea was demurred to, and the only decision was that the demurrer was not good and that the plea was good, and that the action could not be maintained. It was, in fact, a decision on demurrer.

But this was a different case. Liability was disputed on a charge of fraud and arson, the effect of which was that under cl. 12 all benefit under the policy was forfeited. But one of those benefits was the right to go to arbitration, and accordingly they forfeited that along with the other benefits under the contract. Speaking for himself, where there was a repudiation which went to the whole substance of the con-

tract, he did not see how the party so repudiating could be entitled to insist on the subordinate terms of the contract. When the case went to trial, the jury found that the charge of fraud and arson had broken down, and the learned Judge gave judgment for the Plaintiffs for a definite amount. He thought that that was perfectly right and that the right to arbitration had gone.

Messrs. G. Hewitt, K. C., and *S. Mayer, K. C.*, and *Mr. Evans*, for the Appellant.

Messrs. J. B. Matthews, K. C., P. B. Durnford and *Mr. Holman Gregory, K. C.*, for the Respondents.

B. D. *Appeal allowed*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION.—Before D. CHATTERJEE and CHAPMAN, JJ. CIVIL RULES NOS. 802 AND 803 OF 1914. DWARKA NATH SEN, Plaintiff, Petitioner *v.* TARA PRASANNA SEN AND OTHERS, Defendants, Opposite Party. 14th December 1914.

Civil Procedure Code (Act V of 1908)—Rehearing case pending before Munsif—Defendant's application to District Judge for its transfer—Allegation against Judicial officer—Order of transfer of the case without notice to Plaintiff and without calling explanation from Judicial officer, if proper.

In October 1912 the Plaintiff-Petitioner brought two suits for declaration of right of way and removal of obstruction to way in the Court of First Munsif at Narail against the Defendants, Opposite Party. The suits having lasted for a year-and-a-half were decreed *ex parte* on the 16th April 1914. Defendant No. 1, Opposite Party, thereupon made two applications for rehearing the aforesaid cases in the Court of the First Munsif, Narail, and notices were issued on the Plaintiff to show cause why the said cases should not be reheard. But on the 14th May 1914 the 1st Munsif wrote to the District Judge of Jessore that subsequently to the trial of the original case he had come to know that a friend of his was interested in the case and that he would rather not try these cases. He also said that he understood that the 3rd Munsif was also similarly interested. He therefore requested that the cases might be transferred to the Court of the 2nd Munsif. On the 20th May 1914, Defendant No. 1, however, made an application to the District Judge of Jessore stating that the 2nd Munsif of Narail was also interested. The application was not supported by any affidavit or sworn testimony of anybody. The District Judge without issuing notice to the Plaintiff or calling for an explanation from the Munsif at Narail passed an order on the 12th June 1914 transferring the case to the 3rd Munsif at Jessore. On the 13th July 1914, the Plaintiff applied to the District Judge for setting aside the aforesaid order as being without jurisdiction. On the 17th July 1914, the District Judge refused the application and passed the following order: "The Judge may transfer cases *suo-motu*. Notice to Opposite Party is not always necessary. I see no sufficient reason to rescind the order already passed. The application is refused." The Plaintiff-Petitioner then moved the High Court and obtained the present Rules.

The order of the District Judge was objected to on two grounds. The first that the Petitioner before the learned District Judge was allowed to make an allegation against a Judicial officer and although neither that Judicial officer nor the party interested in opposing the application had any notice of the application and although the statements made with regard to the 2nd Munsif of Narail had not been made a subject-matter of inquiry or investigation, an order was passed for the transfer of the case. Secondly, that no order ought to have been passed for transfer without notice to the Plaintiff. Further that this was a matter in which the convenience of the parties was of great importance.

Held, that the objections taken by the Petitioner were valid and that this was a case in which the order for transfer ought not to have been made without notice to the Plaintiff.

The order of transfer was set aside and the District Judge was directed to dispose of the applications after hearing the Plaintiff and also considering the objection that circumstances have changed since the last order was passed.

Babus Jogendra Chandra Ghose and *Smritish Chandra Ghose* for the Petitioner.

Babu Braja Lal Chakravarti for the Opposite Party.

H. C. S. *Rules made absolute.*

THE EMPEROR *v.* SARATH.

in support of it a decision in *Emperor* v. *Muhammad Hadi* (1). That case does not purport to go beyond the decision on which it is based, that is to say, the decision in *Queen-Empress* v. *Ahmad* (2). But in fact it does enlarge the rule laid down in this case in so far as it applies the rule in the earlier case which was limited to witnesses produced, to witnesses whom the accused might be prepared to produce, and this enlargement is in conflict with the express terms of sec. 208. I cannot myself see that the Magistrate has in any way failed to observe the provisions of that section. It is not suggested that he did not hear all the evidence produced before him, and that is all that is required by the first paragraph. The fact that an application was made on the date on which the accused was committed to the Sessions for the summoning of further witnesses appears to me to introduce no conditions which show that the provisions of that section had not been observed. It is important to notice that what was sought was that the Magistrate should allow reasonable time for filing documents and summoning witnesses. On that the Magistrate made the order that "the accused are committed to the Court of Sessions to-day, no further adjournment can be allowed".

The application therefore was obviously too late, for the commitment had been made. More than that, I think in the circumstances of this case that the accused is not deserving of any great sympathy because an application could have been made at once to this Court under sec. 215 for the quashing of the commitment if the circumstances permitted it. But instead of doing that the accused waited until the case was called on at the Sessions and took this point a month after the event. In my opinion we ought not to uphold this reference and we direct the Sessions Judge to proceed with the trial of the accused.

TEUNON, J.—I agree.

(1) I. L. R. 26 All. 177 (1903).
(2) I. L. R. 20 All. 264 (1898).

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI
1914,
Heard, 20 and 21, October.
Judgment, 18, November.

KARMALI ABDULLA ALLARAKHIA,
Appellant,
v.
VORA KARIMJI and ors.,
Respondents.

Partnership debt, debt incurred by individual partner for partnership purposes, when—Bills drawn and discounted by each partner separately, accepted by third party—Latter's right to hold both partners responsible on each bill.

Where two persons entered into a partnership for doing business in brown sugar to be shipped from Mauritius to Hongkong, but in order to keep the partnership a secret from a rival shipper at Mauritius, made arrangements for the shipping and consignation in separate names, half in the name of one partner and half in that of the other, and for their purchases drew bills separately in their respective names on the Plaintiff who owed neither of them any money but accepted them with full knowledge of the terms and conditions of the partnership agreement, but subsequently when the bills fell due, one of the partners (K) met the bills drawn by him, but the other partner (R) did not, and then became insolvent whereupon the Plaintiff as acceptor met them and then sued both partners on the same:

Held—*That the money advanced on each of these bills was on account, and for the*

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credit of the partnership and the Plaintiff was entitled to a decree against both partners.

Where goods are purchased or money raised for a joint adventure and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners. But there is no such responsibility for goods, etc., purchased on the credit of an individual adventurer previously to the contract though afterwards brought into stock as his contribution.

The criterion to be applied to the particular facts of each case in order to see whether the transaction is or is not a partnership transaction, as stated in GOUTHWAITE *v.* DUCKWORTH (2), *approved.*

When a drawer discounts an acceptance which is given at a time when the acceptor owes no money to the drawer the drawer avails himself of the acceptor's credit.

This was an appeal from a judgment and decree of the Bombay High Court (Sir Basil Scott, C. J., and Batchelor, J.), dated the 17th January 1910, which reversed a judgment of Russell, J., dated the 13th April 1909. The facts of the case sufficiently appear from their Lordships' Judgment. The question for determination on the appeal was whether an agreement, dated the 25th July 1906, entered into between the first and second Respondents, and with the privity of the Appellant, constituted a partnership or a joint venture. The agreement was in the following terms :

We the undersigned, Vora Karimji Jivanji & Co., and Khoja Rashid Alidina and Co., at present residing at Bombay, for the purpose of doing business in partnership [illegible] red (? brown) Mauritius sugar, from Mauritius for China-Hongkong, agree with each other (to act) according to the underwritten conditions. The particulars of the said (conditions) are as follows :—

1 The people of Vora Ka : Ji : & Co. and the people of Ra : A : & Co. are jointly to purchase at Mauritius red (brown) sugar suitable for China-Hongkong demand, after consulting each other and paying (proper) attention to the intelligence (that may be sent) by us from Bombay. As to the quantity that may be purchased from time to time, each one of the two parties is to send to the other party "delivery order" on the Dock, in respect of the half (of that quantity), that is to say, the people of Vora Ka : Ji : & Co. are to send to Ra : A : & Co. "delivery" (order) on the "Dock" in respect of exactly half the number of *Bastas* (packages) which they may have purchased ; and in the same manner the people of Ra : A : & Co. are to send to Vora Ka : Ji : & Co "delivery order" on the "Dock" in respect of exactly half the number of *Bastas* (packages) which they may purchase Neither of the two parties is to give (allow) a share to any person whatever in such sugar purchased on (the) partnership (account)

2 Both the parties are to buy the said red (brown) sugar. When a quantity sufficient to load a vessel with the consignment thereof is purchased, then both the parties, after consulting each other and also according to the intelligence (?) (received) from the Bombay (firms) are to charter any steamer whatever, and having loaded thereon the sugar so purchased on (the) partnership (account) half and half (by each party), (they) are to cause that steamer to sail for Hongkong.

3. Both the aforesaid parties are to ship the said red (brown) sugar without gunny bags, and also (they) are to ship (the packages thereof) without putting any mark on them. Each of the (two) parties is to prepare an invoice of the purchase (price) and charges also including the expenses incurred, in respect of such number of *Bastas* (packages) as (each party) may ship on board (the steamer) ; (and the representative) of Ra : A. & Co. is to send his invoice to its Bombay firm and (the representative) of Ka : Ji : & Co. is to send his invoice to its Bombay firm.

(2) 12 East 421 (1810).

4. As to the sugar which the abovementioned both the parties may consign for Hongkong per chartered steamer, against the vouchers thereof, they are to write (draw) Bombay Hundi-documents; (the representative) of Khoja Ra: A: & Co. is to write (draw Hundis) on its Bombay firm; so also (the representative) of Vora Ka: Ji: & Co. is to write (draw Hundis) on its Bombay firm,
(a)
(for the present as long as Vora Ka: Ji: & Co. have not opened their firm in Bombay
(a)
so long), (? the said Ka: Ji: & Co) are to write (draw) "documents" on our Hongkong Agents Khoja Karamali Abdulla & Co.'s Bombay firm which is carried on in the name of Khoja Abdulla Allarakhia & Co. in respect of the sugar consigned through the said (firm). As to the Bombay "document Hundis" against the steamer carrying sugar direct from Mauritius to Hongkong, if the banks of that place should refuse to receive (? accept those Hundis), then we are to be informed of the same by wire, in Bombay. And immediately after the receipt of such information, the people of Rashid Alidina & Co. and the people of Vora Karimji Jivanji & Co. are to make arrangement here, with our Hongkong Agent's firm and inform (the people) at Mauritius (about that arrangement) or are to send from banks (? letters of) "credit" or having received half the amount from the firm of this place (viz Bombay) of the Hongkong firm, (they) are to remit the same by wire. This subject has already been talked about personally with the representative of the local firm of the Hongkong Agents.

5. On the steamer carrying red (brown, sugar from Mauritius arriving at Hongkong, as to the offers with regard to sales of (those) goods which may be received from that place, Khoja Ra: A: & Co and Vora Ka: Ji: & Co. of this place are to consult amongst themselves about them; and as to whatever (instructions) they may communicate by wire, through the Agents at this place about causing the sales to be effected, the sales are to be effected according to those (instructions). Accounts of sales should come from Hongkong (separately) in the names of the two parties (*i.e.*) in respect of half and half (the quantity for each party). On the cargo carried by one (particular) steamer being entirely sold (and) so soon as the account-sales in respect of the entire consignment are received, the amounts of the invoices received (from) Mauritius from both the parties are to be added up, (and) the net surplus of the account-sales (? is to be ascertained) (*i.e.*) on (the one item) being deducted (from the other), as to whatever surplus (or) deficit may be found, the same is to be divided and received (? or paid) forthwith by both the parties amongst themselves. In this manner accounts in respect of each of the steamers are to be settled (immediately) after the accounts (sale, etc.) of the entire (cargo thereof) are received

6. As to the steamers which may be chartered at Mauritius for the purpose of the aforementioned business in red (brown) sugar the same are to be chartered in the name or names of any one or both of the two (parties). And as to whatever commission on the freight thereof may be received at Mauritius, or if the freight has to be paid in Hongkong, then (as to the commission) which may be received there, out of that (commission) the sundry expenses and presents, etc., (made) to Captains being deducted, the net (amount of) commission which (may remain over and) may be received, is to be divided and taken in equal half shares (by both the parties)

7. For the purposes of the aforesaid business in red (brown) sugar the steamers are to be chartered at Mauritius or at times we people are to charter (steamers) at Bombay and inform (the people) at Mauritius. In those (steamers) red (brown) sugar or other goods, *viz.*, white (? refined) sugar or molasses belonging to the partnership account of Vo: Ka: Ji & Co and Ra. A. & Co. are to be shipped goods belonging to any other person are not to be shipped. In case it be found necessary to give (issue) orders to some (other people), or if such a time should come when the goods to be shipped on (the joint) account of us both be small in quantity, and (therefore) it be (necessary) to give (? issue) orders (to other people) in the town, then in that case, such orders are not to be given (issued) without (obtaining) the permission of the people at Bombay. (They) are (first) to apply for permission

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from Bombay (people); if (they) give permission, (the Mauritius people) are to issue orders; people there (at Mauritius) are not to exercise their (own) authority (for the same).

8. If on some occasion the said purchases of red (brown) sugar made at Mauritius be small (*i.e.*) if the quantity of the goods be not sufficient to load the (whole) steamer for consignment, or if a steamer cannot be secured for (shipping) such goods as may have been (purchased), then (in that case) the people of that place (*i.e.* Mauritius) after having taken the permission of the people at Bombay or after consulting each other, are to consign those goods for Hongkong half and half (in each party's name) as stated above, by any steamer whatever on the partnership account The invoices of those (goods) also should come (? should be sent) to us at Bombay as stated above; also the accounts-sale (thereof) should, as stated above, come to us both (? should be sent to us both) from Hongkong (*i.e.*) in respect of half (the quantity of the goods to each). And as to whatever surplus (or) deficit (? profit or loss) there may be (found) therein, the same is to be divided and received (or paid) forthwith half and half.

9. If at any time, there may not be a demand at profit in Hongkong of red (brown) sugar purchased on the partnership account, or there being a demand at profit, if any buyer in Mauritius should offer to purchase the same, at a profit from our people (there), then in that case also (the people at Mauritius) should take instructions of people at Bombay. If they get permission from Bombay from both of us to effect the sales, then (they) both of them are to sell the same on partnership account. As to whatever profit may be made by such (sales), both the parties in Mauritius are to divide and take the same in equal half shares.

10. Both of our representatives at Mauritius, after consigning sugar (as) mentioned above for Hongkong, will draw Hundis payable at Bombay (and) will send here invoices enclosed under cover. In doing so, if (they) should draw "document-Hundis" (for sums) larger (or) smaller than (the amounts of) the invoices, then they are to give or take credit (in the account) for interest thereon (? on the difference) at the rate of Re. ¾ (per cent per month). (They) themselves are to bear the additional discount paid in respect of the Hundis which are drawn in excess. As regards the partnership account, (they) are (only) to give or receive credit (therein) for the interest at the rate of Re. ¾ (per cent per month).

11. This agreement for the partnership business begins (? comes into force) from the 25th day of July of the current year. We bind ourselves on our true religious faith properly to continue the same (in force) for one year.

The Court of first instance found that it was a partnership and that the moneys paid in advance by the Plaintiff upon certain hundis were paid and advanced for and on account and for the credit of the partnership. This finding was reversed by the Appellate Court, which held that on a proper construction of the agreement there was no partnership, and that each of the Respondent firms was liable to the Appellant only in respect of their own hundis, and the charges incurred in connection with their own shares of the shipments.

Hence this appeal.

Mr. L. DeGruyther, K.C. (with him *Mr. Henry O'Hagan*), for the Appellant, submitted that the case was governed by the provisions of the Indian Contract Act, 1872. The agreement ought to be construed in its natural meaning: *Norendra Nath Sircar* v. *Kamalbasini Dasi* (7). So construed the agreement amounted to a partnership as defined by sec. 239 of the Indian Contract Act. Illustration (*a*) to that section applied to this case. Reference was also made to secs. 249, 251 and 252 of the Act.

Mr. Clauson, K.C., and *Mr. G. R. Lowndes* for the Respondents submitted that the agreement did not constitute a partnership, but only a joint venture. The hundis drawn by the second Respon-

(7) L. R. 23 I. A. 18 at p. 26 (1896).

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dent firm were drawn in their own name and for their own purposes and there was no agreement by the first Respondent to be responsible for the same. Reliance was placed on *Heap* v. *Dobson* (4) and *Gibson* v. *Lupton* (8), Lindley on Partnership, p. 233.

Mr. DeGruyther in reply referred to *Gouthwaite* v. *Duckworth* (2) as laying down the law in such cases.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—This action arises out of transactions connected with a venture in brown sugar entered into by the first and second Respondents. The second Respondent is now bankrupt and the third Respondent is his official assignee: and neither of them defended the action or took part in the proceedings under appeal.

The first Respondent, Karimji, and second Respondent, Rashid, were both merchants carrying on business in Mauritius and had for some time been rivals in the sugar trade.

Rashid had all along also had a Bombay house, and Karim was in the act of setting one up, but it was not at the date to be presently mentioned yet open.

The Appellant, Karamali, is a merchant carrying on business in Bombay and Hongkong.

Karim and Rashid resolved to have a joint speculation in Brown sugar to be shipped from Mauritius to Hongkong. The terms of the arrangement they made between themselves were on 25th July 1906 embodied in a stamped agreement. The document is too long to quote, but may be summarised thus—It begins with a preamble that the parties "for the purpose of doing business in partnership in brown sugar from Mauritius to Hongkong agree to act as follows." Then follow the terms. Purchases were to be made "jointly" at Mauritius. These purchases were to be made by both firms after consultation with each other, and after taking advice from the Bombay houses. No limit as to purchase is imposed on either firm; but as soon as either firm buys, that firm is to give a delivery order on the Dock warehouse for half the quantity of the parcel to the other firm. When sufficient sugar to load a ship has been purchased, then a ship is after consultation to be chartered, and loaded with the purchased sugar and despatched to Hongkong. Invoices of the sugar, made out separately as half and half, were to be sent respectively to each of the Bombay firms. At the same time Rashid was to draw bills to the value of the sugar on his Bombay house, and Karim on his Bombay house when it came to be opened. But until that time came he was to draw bills on Karamali. If the banks at Mauritius refused to discount the bills on the Rashid or Karim house, the Bombay firms were to be informed by wire, in which case it was said that Karamali would come to the rescue by interposing credit according to arrangement made with him. On the ship arriving at Hongkong the arrangements as to sale of the sugar were to be carried through by the Bombay houses. Account sales were to come from Hongkong made up separately half and half to each. Then the invoices were to be added together and the surplus or deficit on the entire transaction was to be divided equally. Chartering was to be done in either one or both names; but all commissions were to be equally divided. In the event of the Hongkong market being

(2) 12 East 421 at p 424 (1810).
(4) 15 C. B. N. S. 460 (1863).
(8) 9 Bing. 303 (1832)

bad and there being an opportunity of a profit by reselling at Mauritius, this was to be done after permission got from Bombay; and such profit on all sales was to be equally divided. The agreement was to remain good for a year from date of signing. There is then an addendum to the agreement written and signed by the Plaintiff, in which he binds himself to come to the assistance of the partners if the Mauritius banks refuse to discount the bills drawn by the Mauritius firms of the two Defendants on their own Bombay firms respectively.

Following on this agreement a venture was commenced, and the terms of the agreement were literally carried out, except in one particular. That is to say, sugar was bought, about 36,000 bags by Karim, and about 4,000 by Rashid. Delivery orders were then given by each to each for half of the sugar purchased by him, and the sugar so divided on shipment was consigned to the Hongkong firm of the Plaintiff. The one particular in which the agreement was not literally complied with was that the bills were not drawn by Rashid and Karim at Mauritius on Rashid and Karim in the first instance and then, on refusal of the banks to discount, recourse had to the assistance of the Plaintiff; but they were at once drawn on and accepted by the Plaintiff's firm at Bombay. The bills were drawn by Rashid and Karim respectively for sums approximately representing the value of the sugar shipped upon the separate invoices of each, *i.e.*, about half and half—an exact half being unattainable on account of the packages in which the sugar was put up.

The sugar arrived at Hongkong, and was sold by the Plaintiff to whom it was consigned. The venture, however, turned out a failure instead of a success; the prices realised not being sufficient to give a profit after payment of the price of the sugar, the freight and other expenses.

The Plaintiff accordingly raised this action, which is truly an action of accounting against both Rashid and Karim. Now, when the bills drawn by the two Defendants had become due, and were payable to the banks who held them, Karim had retired the bills of which he was the drawer, but Rashid, who had by this time become insolvent, had not retired the bills of which he was the drawer, with the result that the Plaintiff whose name was on these bills as acceptor had to retire them. This necessarily brought out a considerable balance on the whole transaction as due to the Plaintiff. The bankrupt Respondent Rashid and his official assignee did not oppose judgment being entered against them; but the solvent partner Karim opposed judgment upon the ground that he had paid all sums due on bills signed by himself, and that he was not liable in respect of any monies raised on bills to which he was no party.

The case depended before Russell, J., in the High Court at Bombay, who after trial found in favour of the Plaintiff. The material ground of his judgment may be effectively summarised by quoting two of his findings on the issues which he incorporated with his judgment, which were as follows:—

"I find (1) There was a partnership between first and second Defendants' firms . . . (4) The Plaintiff paid and advanced moneys on the Hundis (Bills) for and on account and for the credit of the said partnership"

The Court of Appeal reversed that judgment. The gist of their judgment may be taken from the concluding paragraph thereof, which is as follows:—

"Treating the question as purely a question of liability between the parties to the

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bills of exchange it is manifest that the Plaintiff cannot succeed in charging the first Defendant with liability on bills of the second Defendant, and having regard to what appears to us to be the correct construction of the agreement between the parties, we cannot hold that there is any collateral agreement by which one shipper agreed to be liable for the default of the other in not taking up the bills of exchange drawn by him on the Plaintiff."

Their Lordships are of opinion that it is erroneous to treat the question as purely a question of liability on the bills. In other words, they think the issue proposed by the learned trial Judge to himself was right. The case of *In re Adansonia Fibre Co.* (1) seems to have been much pressed on the Court by the learned Pleader. But the very first sentence of the judgment of James, L.J., shows that in that case the only question was whether in a winding up proof could be made on the bills alone; and that all questions of ultimate liability were left undecided.

No one doubts that there was here a partnership. It is stated to be a partnership in the agreement, and it amply falls within the definition of a partnership given by the Indian Contract Act, which rules parties in this case. It is, however, partnership of a limited character, and consequently liability to be enforced against one partner when there is no document of debt which on its face binds him, can only be justified if it was shown that what he did was within the operations natural to the partnership and for the partnership.

Their Lordships think that the law on these matters is accurately stated in the well-known judgment of Lord Ellenborough in *Gouthwaite* v. *Duckworth* (2). In saying "the law," it would perhaps be more accurate to say, a statement of the criterion which is to be applied to the particular facts of each case in order to see whether the transaction is or is not a partnership transaction. In that case it was sought to make Duckworth liable for goods purchased by Brown and Powell, and Lord Ellenborough says this: "There seems also to have been some contrivance in this case to keep out of general view the interest which Duckworth had in the goods; the other two Defendants were sent into the market to purchase the goods in which he was to have a moiety; and though they were not authorised, he says, to purchase on the joint account of the three, yet if all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose as if all the names had been announced to the seller, and therefore all are liable for the value of them." He distinguishes the case of *Saville* v. *Robertson* (3) thus: "The case of *Saville* v. *Robertson* (3) does indeed approach very near to this; but the distinction between the cases is that there each party bought his separate parcel of goods which were afterwards to be mixed in the common adventure on board the ship, and till that admixture the partnership in the goods did not arise." And Bayley, J., after describing *Saville* v. *Roberston* (3) in the same way says: "but here as soon as the goods were purchased the interest of the three attached in them at the same instant by virtue of the previous agreement."

Mr. George Joseph Bell, in his celebrated Commentaries on the Principles of Mercantile Jurisprudence, after stating that the law of Scotland is the same as the law of England in this matter, quotes the judgment of Lord Ellenborough as correctly laying down the law, citing, *inter alia*, a case of *Kinnear*, on the same

(1) 9 Ch. App. 635 1874).
(2) 12 East 421 (1810).
(3) 4 Term Rep. 720 (1792).

lines as *Gouthwaite* (2), which was affirmed in the House of Lords in 1765, and the whole matter is comprehensively expressed in his Principles, sec. 395, in words which their Lordships think accurately give the result of the cases both old and modern. "Where goods are purchased or money raised for the joint adventure, and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners. But there is no such responsibility for goods, etc., purchased on the credit of an individual adventurer previously to the contract though afterwards brought into stock as his contribution. . . ."

It may be and often is a difficult matter to say on which side of the line thus indicated the facts of a particular case fall, and cases will be found illustrating both results. To the cases already cited may be added the case of *Heap* v. *Dobson* (4) while in the Scottish Courts may be taken as on the lines of *Gouthwaite's case* (2) the case of *British Linen Co.* v. *Alexander* (5) (where the facts are strikingly similar to the present case), and on the lines of *Saville* and *Heap's* cases (3 & 4), *White* v. *McIntyre* (6).

Their Lordships are aware that Lord Lindley, in his capacity as an author but not as a Judge, expressed some doubts as to whether the case of *Gouthwaite* (2) could be supported. They are of opinion that, whether that doubt is sound or not, it is not a criticism on the criterion of law indicated by Lord Ellenborough and the other Judges; but is only an indication that a different view might have been taken of the facts of that particular case.

(2) 12 East 421 at p. 424 (1810).
(3) 4 Term Rep. 720 (1792).
(4) 15 C. B. N. S. 460 (1863).
(5) 15 D. 277
(6) 3 D. 334.

Turning then to the present case, their Lordships have come to the conclusion that the judgment of the trial Judge was correct. The considerations which lead them to that result are as follows :—

It is clear from the terms of the agreement that either of the two partners by the mere fact of purchase (after consultation as to price) could subject any sugar independently of the action of the other to becoming partnership sugar. A purchase of sugar therefore becomes a purchase for the partnership, and any one who sold the sugar, or advanced money by which the sugar was bought, was crediting the partnership with goods or money. This is further accentuated by the provision as to possible re-sale in Mauritius itself. If either party in the case bought sugar, and then came to re-sell it in terms of that article, he could not refuse his coadventurer a share of the profit he made. These considerations make it impossible to say, as was said effectively in *Saville's* case (3) or *Heap's* case (4), that the joint adventure only began when the goods were shipped, as it is clear that the joint adventure began as regards each parcel from the moment that parcel was bought. The learned Judges of the Court of Appeal are impressed with the view that the agreement is "elaborately drawn for the purpose of keeping the interests of the two shippers distinct . . . except in so far as a combination between them was desirable for the purpose of securing joint shipment and a sale of the sugar at Hongkong." Their Lordships cannot take this view. It ignores the fact that notwithstanding the separate shipment and consignation documents, the sugar was admittedly to be accounted for as partnership sugar. Supposing that the particular parcels con-

(3) 4 Term Rep. 720 (1792).
(4) 15 C. B. N. S. 460 (1863).

signed by one had in some way been deteriorated, either by perils of the sea, without insurance, or by the development of some intrinsic fault, it is perfectly clear that the other party would have had to bear his share of the loss resulting in the whole cargo. No doubt the anxious arrangements for shipping and consignation in separate names were peculiar. But the reason for them is amply explained by the fact that the parties desired secrecy, being afraid at Mauritius of the hostile action in breaking prices of a rival whose astuteness they deploringly acknowledged.

Moreover, it is clear not only that the facts as to the terms of a partnership in the sugar shipped are as have been stated, but that the Plaintiff knew the whole terms and conditions of the agreement He knew, therefore, he was helping by advance of credit the partnership in its purchase of sugar. The learned Appeal Judges say that the Respondent Karim did not avail himself of the Plaintiff's credit. That that credit was not interposed in the precise way originally contemplated by the 4th article of the agreement is true. But that they did not in fact avail themselves of the Plaintiff's credit is obviously an error. The bills speak for themselves. When a drawer discounts an acceptance which acceptance is given at a time when the acceptor owes no money to the drawer, it is idle to say that the drawer does not avail himself of the acceptor's credit; and if anything more was wanted it is to be found in the evidence of Karim himself, who admits in cross-examination, "For the purchase of all that sugar neither I nor Rashid paid a rupee; it was all paid for by Hundis accepted by the Plaintiff."

Their Lordships will, therefore, humbly advise His Majesty that the Appeal should be allowed and the Judgment of the trial Judge restored, the Defendant Karim paying costs in the Courts below and before this Board.

Solicitors: *Messrs. Ashurst, Moris, Crisp & Co.*, for the Appellant.

Solicitors: *Messrs. Latteys and Hart* for the Respondents.

B. D. *Appeal allowed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 163 OF 1914.

CHITTY, J. 1915, 11, January.

KUMAR KRISHNA MITTER, v. AMULYA CHARAN MITTER.

Code of Civil Procedure (Act V of 1908), sec. 73 (1), (c)—Surplus sale-proceeds, distribution amongst attaching creditors—Money standing to the credit of one suit, application for transfer to another suit, if to be made in former—Practice—Certificates of Accountant-General and Registrar, Original Side, required with application

Where money in Court stands to the credit of one suit and the Plaintiff in another suit has, by reason of being an attaching creditor or mortgagee or otherwise, an interest in such money and desires the fund to be transferred to the credit of his suit in order to be dealt with therein, he should in all cases make the application in the suit to whose credit the money stands for the transfer.

In an application on the Original Side of the High Court for the transfer and rateable distribution of funds to which the provisions of sec. 73 (1), cl. (c), of the Code of Civil Procedure (Act V of 1908) may possibly apply, the Applicant should be required to produce, in addition to the certificate of the Accountant-General, a certificate of the Registrar.

This is an Application in Chambers, the facts of which are fully set out in the judgment.

KUMAR KRISHNA MITTER *v.* AMULYA CHARAN MITTER.

The JUDGMENT OF THE COURT was as follows :—

CHITTY, J.—This is an application by Kumar Krishna Mitter, decree-holder in suit No. 163 of 1914, asking that a fund of Rs. 4,650-2-7 lying in the hands of the Accountant-General of this Court to the credit of the said suit be, after payment of the Petitioner's costs, divided rateably between the Petitioner and Ram Chandra Ray Chaudhuri, execution-creditor in suit No. 453 of 1910. The facts are as follows :—Property which had belonged to Hari Das Mitter, deceased, was subject to a mortgage, dated 19th December 1901, in favour of Byomkesh Chuckerbutty. The mortgagee instituted a suit on his mortgage (No. 179 of 1911) making the representatives of Hari Das Mitter, parties Defendants. The final decree in that suit, dated 15th January 1913, ordered a sale of the mortgaged property. The sale took place on 2nd May 1914, and after making the first and second payments prescribed by sec. 73 (*1*), proviso (*c*) (it does not appear that there were any subsequent incumbrances), there remained a sum of Rs. 4,650-2-7 as surplus sale-proceeds.

On 6th April 1914, the present Petitioner obtained a decree in this Court for Rs. 1,644-15-9, interest, and costs against the estate of Hari Das Mitter. On 18th June 1914, he applied for execution and attached the surplus sale-proceeds above mentioned. In November last he applied to have the said fund transferred to the credit of his suit, No. 163 of 1914, and it was so transferred under an order of 2nd December 1914. That transfer was made without notice to other creditors. The certificate of the Accountant-General, which was the only certificate required on the application for transfer, showed no attachment or other impediment as regards that fund.

On 22nd December 1908, Ganga Das Mahta had obtained a decree in Small Cause Court Suit No. 22785 of 1908 against the estate of Hari Das Mitter for Rs. 1,684-2-0 including costs and interest up to 26th April 1911. The statement in para. 13 of the present petition that, that was a persónal decree against Amulya Charan Mitter and Bireshur Mitter, is incorrect. That decree was transferred to this Court for execution on 1st May 1911, and on 28th August 1911 that execution-creditor attached the mortgaged property.

On 29th July 1910 Ram Chandra Ray Chaudhuri obtained a decree in suit No. 453 of 1910 for Rs. 2,701 with further interest and costs against the estate of Hari Das Mitter. In execution of that decree he also on 10th January 1913 attached the mortgaged property.

There was a further execution-creditor, Gourhari Mukerjee, who held a money-decree for Rs. 2,000 odd against the estate of Hari Das Mitter, but as he did not apply for execution until 12th December 1914, *i.e.*, after the assets had been received by the Court, it is obvious that he has no *locus standi* on the present application, and his claim may therefore be left out of consideration.

On 22nd December 1914, the present Petitioner applied that the fund might be rateably distributed between himself and Ram Chandra Ray Chaudhuri. For the purpose of this application it was necessary for him to produce certificates, not only of the Accountant-General, but also of the Sheriff and the Registrar. From the two latter it appeared for the first time that there were attachments against the property at the instance of Ganga Das Mahta and Ram Chandra Ray Chaudhuri. It is clear that by the provisions of sec. 73 (*1*), proviso (*c*), these persons are entitled

to be paid rateably out of the proceeds of sale in priority to the present Petitioner, whose attachment was issued after the sale, and then only against the surplus sale-proceeds. As their claims are more than sufficient to absorb the whole fund, Rs. 4,650-2-7, it follows that there will be nothing left for the Petitioner, and his present application must necessarily fail. It is a matter of regret that it should have been possible for the Petitioner to obtain the order for transfer of the fund without its transpiring that there was in reality no fund to transfer, in which he could hope to share. This is due to two defects in our procedure, one of which has already been recently dealt with by the issue of a general order. Till recently it was uncertain in which suit an application for transfer of a fund should be preferred, the suit to the credit of which the fund lay, or the suit to which it was to be transferred. I have intimated that in future it should in all cases be made in the suit, to the credit of which the fund is lying. The second defect is that in applications for transfer, such as that in the present case, orders have been passed on the certificate of the Accountant-General only. From this certificate all the attachments or incumbrances on a property or its sale-proceeds do not necessarily appear. If on such applications the Petitioner were required to produce a certificate also from the Registrar, he would be compelled to search the registers of that officer as well, and any objections, which might exist to the transfer, would necessarily be disclosed. In my opinion this practice should be followed in the future, and on an application for the transfer of a fund to which the provisions of sec. 73 (*1*), proviso (*c*), Code of Civil Procedure, may possibly apply, the Applicant should be required to produce, in addition to the certificate of the Accountant-General, a certificate of the Registrar.

This application fails and must be dismissed. Under the peculiar circumstances I direct that each party do bear his own costs. As the order for transfer should never have been made, I direct that the funds in question be transferred back to the credit of suit No. 179 of 1911, to be dealt with under sec. 73 (*1*), proviso (*c*), if and when the parties or either of them entitled thereunder make an application for that purpose.

Mr. N. M. Chatterjee, Attorney for the Plaintiff.

Messrs. B. N. Basu & Co. and *Mr. T. B. Ray*, Attorneys for the Respondent.

CIVIL APPELLATE JURISDICTION.]
APPEAL FROM ORIGINAL DECREE
No. 206 OF 1910.

MOOKERJEE, J.	
BEACHCROFT, J.	HEMANTA KUMARI
1912,	DEBI, Defendant,
Heard, 27, 28 &	Appellant,
29, November.	v.
1914,	MIDNAPUR ZEMINDARI
2, 3 & 4 March.	Co., Plaintiffs,
Judgment,	Respondents.
6, July.	

Indian Registration Act (III of 1877), secs 3, 17, cls. (d), (h) (i)—Agreement to grant permanent lease of property not subject o suit, embodied in petition of compromise—Agreement part of consideration of compromise—Decree passed on petition—Specific performance, suit or—Admissibility of petition and decree to prove agreement—Petition if agreement for lease

Per MOOKERJEE, J.—*Although an agreement in writing, which does not operate as a present demise, but is only an agreement for a lease, is (having regard to the extended significance of the term lease as defined in sec. 3 of the Registration Act) required to be registered if the term exceeds one year, and the exemptions provid-*

ed in cls. (h) *and* (i) *to sec. 17 do not apply to leases or agreements for leases, sec. 49 of the Act does not preclude its being received as evidence of any transaction not affecting such property.*

Such a document can therefore be proved by the Plaintiff in a suit for specific performance of the agreement to grant the lease.

KONDURI *v.* GOITUMUKKALA (5), SATYENDRA NATH BOSE *v.* ANIL CHANDRA GHOSH (6), SARAT CHANDRA GHOSE *v.* SHYAMCHAND SINGH (7), *relied on* AND HURJIVAN *v.* JAMSETJI (8) AND PURNANAND DAS *v.* DHARSEY (9), *not followed.*

Where in a suit for recovery of property A, the parties entered into a compromise and in a petition to the Court recited the fact inter alia *that Plaintiff had agreed to grant a permanent lease of property B to the Defendant on certain terms, and the Court recorded the compromise in full and made a decree in these terms : "The suit be decreed in terms of the compromise filed by both parties", in a suit for specific enforcement of the agreement embodied in the compromise petition :*

Held, *per* MOOKERJEE, J.—*That the agreement for lease embodied in the petition was admissible in evidence to prove the contract to grant the lease.*

Per BEACHCROFT, J.—*That the petition simply amounted to a statement to Court that the parties had come to certain terms accompanied by a prayer for a decree on those terms. It in itself was not an agreement to lease.*

That the promise to grant a lease of property B was part of the consideration for the agreement arrived at concerning property A, and the Court in its decree was bound to record the whole of the terms of the compromise, and the decree, though it was final only so far as it related to the subject-matter of the suit, was admissible in evidence to prove the promise to grant a lease of property B.

Documents referred to in cls. (e) *to* (n) *of sec. 17 of the Registration Act are excepted from the provisions of cls.* (b) *and* (c) *and not from those of cls.* (a) *and* (d), *because those documents come within the description of documents in cls.* (b) *and* (c) *and not within the description of documents in cls.* (a) *and* (d).

This was an appeal from the decision of Babu Ram Charan Mallik, Subordinate Judge, Nadia, dated 29th March 1910.

The material facts will appear from the judgment.

Mr. S. P. Sinha, Babus Kishori Lal Sarkar, Bepinbehari Ghose, Debendranath Bagchi and *Bidhubhusan Ganguli* for the Appellant.

Dr. Rash Behari Ghose, Babus Joges Chandra Roy and *Rajendra Chandra Guha* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the Defendant in a suit for specific performance of a contract to grant a permanent lease. The agreement was made on the 20th September 1897 and was in respect of lands which at that time formed the subject-matter of a litigation between the Defendant and the Secretary of State for India in Council. The contract was for the grant of a lease by the Defendant to the Plaintiffs, if the former should obtain a decree in her suit against the Secretary of State. That suit was decided in favour of the Defendant by the Judicial Com-

(5) 17 M. L. J. 21? (1907).
(6) 14 C. W. N. 66 (1908).
(7) I. L. R. 39 Cal. 663 (1912).
(8) I. L. R. 9 Bom. 63 (1884).
(9) I. L. R. 10 Bom. 1?1 (18?5).

HEMANTA KUMARI DEBI *v.* MIDNAPUR ZEMINDARI CO.

mittee on the 21st March 1906; and the Plaintiffs commenced this action against the Defendant on the 26th February 1909. The Defendant denied that she had entered into the alleged agreement with the Plaintiffs and also contended that if the agreement was established, it was of such a character that a Court of equity would not grant specific performance thereof. The Subordinate Judge has overruled the contentions of the Defendant and has decreed the suit. The Defendant has now appealed to this Court. The fundamental point for consideration is, whether the agreement alleged by the Plaintiffs has been proved, and this involves the determination of the question, whether a petition of compromise which embodies the agreement to grant the lease and a decree which recites the terms of the compromise are admissible in evidence to prove the terms of the agreement. For the appreciation of the questions raised, it is necessary to give a brief outline of the facts antecedent to this litigation.

The lands in respect of which a permanent lease is claimed by the Plaintiffs are included in estate No. 1 of the Rajshahi Collectorate, in which the Defendant had 2 annas 15 gundas share with a separate account. In 1863, when the dry lands emerged from the floods, Watson & Co., the predecessors-in-interest of the Plaintiffs, entered into possession. The predecessor-in-title of the Defendant, Maharani Sarat Sundari, instituted a suit for ejectment of the company. The Subordinate Judge dismissed the suit; but on appeal to this Court, that decree was reversed on the 12th February 1868 and a decree was made in favour of the then Plaintiff for such of the lands as were proved to be accretions to Mauza Jotashai. An appeal to the Judicial Committee was preferred, but was dismissed for want of prosecution in 1875. The lands decreed in favour of the Plaintiff shortly afterwards disappeared in the river. When they re-appeared, Government took possession of part of the lands and leased them to the company, while the company took possession of the remainder. There were negotiations between the Defendant and the Government for a settlement of the dispute, but they were infructuous as the Government consented to withdraw from possession, only if the rights of the company were recognised. In these circumstances, the Defendant instituted two suits in 1895 for recovery of possession, one (No. 72) against the Secretary of State in respect of accretion to Mauza Jotashai, the other (No. 73) against the company in respect of reformations on the original site of Jotashai. On the 20th September 1897, the suit against the company was decreed on the basis of a petition of compromise. It is this petition of compromise which embodies the agreement to lease now sought to be specifically enforced. The petition refers to the lands of both the suits; as regards the lands of the suit against the company, the petition provides for the creation of tenancy rights in the company on certain specified conditions; while as regards the lands of the suit against the Government, the petition recites that the then Plaintiff had agreed to grant a permanent lease to the company on certain specified terms, in the event of a successful termination of her claim against the Government. The Court recorded the compromise in full, as it was bound to do under sec. 375 of the Code of 1882, and made a decree in these terms: "The suit be decreed in terms of the compromise filed by both the parties." It may be a matter for controversy whether the Court intended to incorporate in its decree all the terms of the compromise or to give

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effect only to such of the terms as related to the lands in suit; at any rate, under sec. 375, the Court had jurisdiction to pass a decree in accordance with the compromise only in so far as it related to the subject-matter of the suit, and its decree would be final only to such extent. I may take it, consequently, that the decree, while it recited all the terms of the compromise, gave effect to such alone of the terms as related to the subject-matter of that suit. It is on this basis that the company seek in the present suit the specific performance of so much of the agreement as related to the subject-matter of the suit against the Secretary of State. The question necessarily arises, whether the petition of compromise, which embodies the terms of the agreement to lease or the decree which recites the terms of the compromise, is admissible in evidence, notwithstanding the provisions of sec. 49 of the Indian Registration Act. On behalf of the Defendant, it has been argued that as under sec. 3 of the Registration Act, 1877, the term lease includes an agreement to lease, under sec. 17, cl. (*d*), an agreement to grant a lease of immoveable property for any term exceeding one year is compulsorily registrable. It has been pointed out that neither cl. (*h*), which exempts from registration documents merely creating a right to obtain other documents, or cl. (*i*), which exempts from registration decrees and orders of Courts, is of any assistance to the Plaintiffs, as these clauses apply only to cases under cls. (*b*) and (*c*) of sec. 17 and do not affect cases under cl. (*d*). There is considerable force in this contention, and it is worthy of note that in the case of *Panchanan Bose* v. *Chandicharan Misra* (1), the attention of the Court was not drawn to the extended significance of the term lease as defined in sec. 3, nor to the fact that cl. (*h*) of sec. 17 refers only to cases under cls. (*b*) and (*c*). It cannot be disputed that as laid down by the Full Bench in the case of *Sufdar Reza* v. *Amjad Ali* (2), an agreement for a lease, when in writing, is compulsorily registrable under cl. (*d*) of sec. 17. But the question remains, what is the precise effect of non-registration. Sec. 49—I quote so much of the section as is applicable to the present case—is in these terms: "No document required by sec. 17 to be registered shall affect any immoveable property comprised therein or be received as evidence of any transaction affecting such property, unless it has been registered in accordance with the provisions of this Act". The petition of compromise, consequently, does not affect the immoveable property now in dispute; but can it be received as evidence of a transaction affecting such property? The answer will be in the affirmative or negative, according as it is held that the agreement to lease did or did not affect the property. It is plain from the terms of the agreement that it did not operate as a present demise. The distinction between a lease and an agreement for lease may be briefly stated. An instrument by which the conditions of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the lessee either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently, is a lease; it is said to operate by way of actual demise, and when the lessee has entered under it, the relation of landlord and tenant is fully created. On the other hand, an instrument which only binds the parties, the one to demise and the other to accept a lease hereafter is an agreement for a

(1) I. L. R. 37 Cal. 808 (1910).

(2) I. L. R. 7 Cal. 703 (1881).

lease, and although the intending lessee enters, the legal relation of landlord and tenant is not created, unless he also pays rent, in which case he becomes tenant from year to year, upon the terms of the agreement so far as applicable to a yearly tenancy: *Richardson* v. *Gofford* (3). This is subject to the rule in *Walsh* v. *Lonsdale* (4) that, on equitable grounds the Court may, under certain circumstances, treat the parties to be in the same position as if a lease had actually been granted, on the principle that equity considers that to have been done which should have been done. Consequently, where, as here, there is no present demise, the agreement to lease does not operate as a lease and does not affect the land; it will affect the land only when specifically enforced in a suit properly framed for the purpose, or when followed by the grant of a lease. On this principle, it was ruled in *Konduri* v. *Gottumukkala* (5) that in a suit for specific performance of a contract to grant a lease, an unregistered deed containing the alleged agreement is admissible in evidence to prove the contract for the breach of which the suit is brought. This principle was approved in *Satyendra Nath Bose* v. *Anil Chandra Ghosh* (6) and is the foundation of the decision in *Sarat Chandra Ghose* v. *Shyamchand Singh* (7). I am not prepared to adopt the contrary view taken in *Hurjivan* v. *Jamsetji* (8) and *Purnanand Das* v. *Dharsey* (9). I hold accordingly that the petition of compromise has been rightly received in evidence in proof of the agreement to lease.

The question next arises, whether the petition was executed by the Defendant. She says in her evidence that she signed the *solenamah*, and put in the word *iti* on every page, and that her seal was impressed above her signature on every page. The *solenamah*, as actually filed in Court, bears her signature on the first page only with the impression of her seal above it; the other pages do not bear her signature, but bear the impression of her seal in the back. She denies that the word *iti* on the sheets other than the first is in her handwriting. The obvious suggestion is that the original sheets other than the first have been replaced after the document had been executed by her. No such allegation was made expressly in her written statement, and I am in full agreement with the Subordinate Judge that the evidence is insufficient not only to prove such a case but even to raise a reasonable suspicion that there had been a substitution of sheets after execution. No foundation is laid in the evidence as to the identity of the person possibly guilty of such a crime; in the absence of any evidence on the point, I am not prepared to countenance the theory that the company or their officers had bribed her officers to enter into a conspiracy to betray their mistress. On the other hand, upon a careful comparison of the word *iti* which finds a place on every sheet, I am satisfied that the word, wherever it occurs, was written by the same person; and as the word on the first sheet was admittedly written by her, the word on each of the other sheets is in her handwriting—this conclusively establishes the genuineness of all the sheets including the one containing paragraph 8, which embodies the agreement to lease and is suggested to have been interpolated fraudulently. I am not prepared to attach any weight to her assertion that every sheet must have been sealed as well as

(3) 1 A. & E. 52 (1834).
(4) 21 Ch. D. 9 1882).
(5) 17 Mad. L J. 218 (1907).
(6) 14 C. W. N. 65 (1908).
(7) I. L. R. 39 Cal. 663 (1912).
(8) I. L. R. 9 Bom 63 (1884)
(9) I. L. R. 10 Bom 101 (1885).

signed by her in the usual course. I cannot overlook the fact that the document was executed on the 20th September 1897, and she gave her deposition on the 11th July 1909. It would be an extraordinary feat of memory to be able to remember accurately, after the lapse of twelve years, whether one had signed one or more pages of a document and how many times the seal had been put thereon; it is not suggested that she had any occasion to make a special note of this matter at the time of execution or to recall it to memory at any subsequent period. On the other hand, her deposition shows that she is not able, at this distance of time, to recollect accurately the details of the negotiation and the terms of compromise ultimately settled. I am satisfied that the petition of compromise as it stands is genuine in its entirety, and as the Defendant admits that the petition signed by her was executed after she had become fully aware of its contents, there is not room for controversy that she is bound by all the terms of the petition inclusive of the agreement to lease embodied in paragraph 8. This really concludes the case; as the Defendant signed the petition with full knowledge of its contents, there can be no question that the agreement to lease was made as alleged by the Plaintiffs; in this view, it is needless to consider whether the pleader who filed the petition in Court on the strength of a new *vakalatnama* was duly authorised; nor is it necessary to examine the oral evidence as to the negotiations between the officers on both sides which preceded the actual execution of the petition by the Plaintiffs and the Defendant and their respective pleaders. But I may add that on a scrutiny of the evidence I am satisfied that the Subordinate Judge has correctly held that the terms as finally embodied in the petition of compromise are indentical with those actually agreed upon between the parties. The failure of the Defendant to examine important witnesses on her side, namely, her survey amin Asutosh, her jamanabis Srisnarayan, her manager Ambica Charan and her sister's husband Gobinda Chandra as also her omission to produce important documentary evidence, namely, the draft of the *solenamah*, are matters for legitimate adverse comment and tend to throw suspicion on her case. Much stress has been laid on the fact that even after the compromise with the Defendant, the company helped the Government officers in the suit brought by her against the Secretary of State. But the explanation is obvious; the company had not undertaken to remain neutral, much less to assist the Defendant; the company were free to help the Government officers with information, and they did so, because they would not lose even if the Defendant was defeated. The company would be able to take a lease from Government, and that on easier terms than from the Defendant, to whom they would have to pay a profit in addition to any revenue that might be assessed by Government. I hold accordingly that the agreement to lease, of which the Plaintiffs seek specific performance, has been fully established.

Two subordinate questions have been argued on behalf of the Defendant, namely, *first*, that the Plaintiffs have not succeeded to the right of Watson & Co. to enforce specific performance of the agreement to lease, and, *secondly*, that the terms of the agreement are so vague and indefinite that the Court should not grant specific performance thereof. There is no substance in either of these contentions. As regards the first point, it is plain, on the conveyance taken by the Plaintiffs, that they have succeeded to the contrac-

tual right vested in their vendors. As regards the second point, the Subordinate Judge has correctly interpreted the terms of agreement to lease. It would be an obviously unreasonable construction to hold that the Defendant agreed to grant a permanent lease of the disputed lands to the company, only on receipt of the Government revenue; there is no conceivable reason why she should thus make a free gift of the lands to the company after she had successfully litigated against the Secretary of State. The only reasonable construction is that the company undertook to pay her Government revenue in addition to rent at the rate fixed for the lands of suit No. 73, that is, 4 annas, 6 pies per bigha, and this is the view adopted by the Subordinate Judge. The suggestion has been faintly made that even this rate is too low, but I do not feel pressed by this contention; it must be remembered that the rate of 4 annas, 6 pies per bigha is the rate fixed for the lease of the lands of suit No. 73, and that from the year 1319, the Defendant would be entitled to get rent at such rates as may be in force in the vicinity. I may add that the mere fact that the Government has not assessed any revenue on the lands (which were found to be reformation and not accretion) does not entitle the Defendant to claim rent at a higher rate than 4 annas, 6 pies per bigha up to the year 1318; I express no opinion upon the question—what would be fair rent for revenue-free lands with effect from 1319? As the Plaintiffs have not taken any cross-objection, the Court cannot also consider whether the decree is too favourable to the Defendant.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

BEACHCROFT, J.—I agree that this appeal should be dismissed with costs, though my reasons for considering the compromise petition and the decree in suit No. 73 of 1895 admissible in evidence differ somewhat from those given by my learned brother. The view, which I take, is that the petition was not an agreement to lease, and therefore sec. 49 of the Registration Act can have no application. It was a petition presented on behalf of the then Plaintiff, Defendant in the present suit. It is headed "the petition of the Plaintiff Rani Hemanta Kumari", and runs as follows:—"Being apprehensive as to the future result of the said suit No. 73 of 1895 which I have instituted in this Court against Messrs. Robert Watson & Co., Ld., for the lands mentioned in the schedule and which is still pending, now with the consent of both of us this suit is compromised according to the manner mentioned below . . ." Then follow the terms set out in eight paragraphs. The effect of these terms is that the Plaintiff's title as proprietor to the lands in suit is recognised, the company will be given a lease of those lands on certain terms, and also be given a lease of the lands, the subject-matter of suit No. 72, in case of successful termination of that suit against Government. Then follows the prayer, "Hence by filing this *solenamah* with the consent of the Defendant *sahibs* it is prayed that after going through the above statements the present suit may be decided in terms of the aforesaid terms". Then follow the schedule of the boundaries and the signatures of the Managing Agents and the pleader of Messrs. Watson & Co. as consenting to the petition.

To my mind this simply amounts to a statement to the Court by the Plaintiff that the parties have come to certain terms, the accuracy of which statement is accepted by the Managing Agents and

pleader of the company, accompanied by a prayer that the suit may be disposed of accordingly. The document itself is not an agreement to lease but a statement of fact, accompanied by a prayer, in a petition to the Court.

If the terms had been stated orally to the Court, the Court would have been bound to make a record of the whole of them, under sec. 375 of Act XIV of 1882, though the decree of the Court would have been final only as far as it related to the subject-matter of the particular suit. For the convenience of the Court or for the purpose of ensuring accuracy, the terms were put on paper, but that fact does not alter the real nature of the petition, or convert what is really a prayer to the Court into an agreement to lease.

The decree was equally admissible in evidence. As already remarked, the Court was bound to record the whole of the terms of the compromise. The promise to give a lease of the land, which was the subject-matter of suit No. 72, was part of the consideration to the company for consenting to a decree in suit No. 73. If any authority is required for the proposition that the decree would be evidence, it may be found in the case of *Pranal Anni* v. *Lakshmi Anni* (10). The Privy Council remarked: "If the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in that suit, and also a half share of the lands now in dispute, had informed the learned Judge that these were the terms of compromise and had invited him by reason of such compromise to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the Appellant, that the Respondents had agreed to transfer to her the moiety of land now in dispute". That language applies to the circumstances of the present case.

Sec. 17 of the Indian Registration Act does not to my mind create any real difficulty. It is true that the documents referred to in cls. (*e*) to (*n*) of that section are excepted only from the provisions of cls. (*b*) and (*c*) and not from the provisions of cls. (*a*) and (*d*), but that is because the documents enumerated in cls. (*e*) to (*n*) come within the description of documents in cls. (*b*) and (*c*) only and not within the description of documents in cls. (*a*) and (*d*).

As regards the facts I consider it clearly established that the whole of the petition of compromise is genuine and that that part of it which contains paragraph 8 was not a fraudulent interpolation. And I come to this conclusion not merely on the undoubted similarity of writing of the word *iti* in the various places in which it occurs, for the similarity of writing of a single word taken by itself would be a misleading test. But the learned Subordinate Judge has put the matter very clearly and forcibly, in dealing with the 6th and 7th issues, on page 155 of the Paper Book. He points out that the Defendant admittedly signed a *solenamah*, which was fair-copied from a draft prepared by the principal officers on both sides and that she was aware of its contents, that there was evidence that this *solenamah* was the identical one which was filed in Court and that evidence to the contrary, if Plaintiffs' story were untrue, was available to the Defendant, but was withheld.

The question of the authority to compromise of the pleader who filed the petition of compromise becomes immaterial in the view that the Defendant signed

(10) I. L. R. 22 Mad. 508 (1899).

the compromise petition in the form in which it now is. The argument is that he had authority to compromise, but his authority did not extend to the inclusion of matters contained in paragraph 8 of the petition. His authority was contained in a *vakalatnama* filed on the 20th September 1897, the same day on which the compromise petition was filed. The *vakalatnama* contains a precis of the contents of the petition of compromise, but there is no reference to the subject-matter of paragraph 8 of that petition. Though the question of his authority to compromise is immaterial, this *vakalatnama* deserves notice as a piece of evidence supporting Defendant's case that the petition which she signed was added to before its presentation in Court.

A possible explanation of the omission of the subject-matter of paragraph 8 from the precis contained in the *vakalatnama* is that it went beyond the subject-matter of the suit which was to be compromised.

But there are other matters in connection with this *vakalatnama* which deserve notice. The pleader in question, Babu Narahari Mukherjee, was examined as a witness for the Plaintiff. He states that he got the petition of compromise from Sirish Narain Prochanda, the ammukhtear of the Defendant, to be filed.

Sirish Narain, it may be mentioned, is one of the witnesses who ought to have been called for the Defendant. The explanation given for not calling him, based on the allegation of his dismissal from Defendant's service, does not carry conviction. To satisfy himself the pleader asked for a *vakalatnama* specifying the terms of the compromise, signed by the Defendant. Yet having got the *vakalatnama* he says he did not read the petition of compromise as he had no time; it was brought to him just before the rising of the Court, and he took Sirish Narain's word that its contents corresponded with what was written in the *vakalatnama*. In cross-examination this statement was modified, the witness admitting that the petition was brought to him the day before it was filed. It is clear that the petition was not brought just before the rising of the Court and filed at once, for the order sheet of the record shows that on the filing of the petition the Judge ordered the case to be called up that day for orders, and later on the same day decreed the suit in terms of the compromise. Further, having asked for a *vakalatnama* to satisfy himself as to the terms of the petition of compromise the pleader did not trouble to compare the two, and finally when the decree was drawn up in accordance with the compromise petition it was he who signed it on behalf of the Defendant.

Various theories for his conduct are possible: either he was satisfied that the petition of compromise was covered by the terms of the *vakalatnama* and the contention advanced for the Plaintiffs was that the word *ityadi* was wide enough to cover the terms of paragraph 8, or he knew that the petition of compromise went beyond the terms of the *vakalatnama*, and filed it honestly because he believed it to have been signed by Defendant, or he filed it dishonestly in the interests of Robert Watson & Co. It is also a possible theory that the difference in the two documents was due to design as a means of subsequently attacking the compromise.

Now, had he intended to act dishonestly in the interests of Robert Watson & Co., there was no necessity for him to get a fresh *vakalatnama* specifying the terms of the compromise, for under his original *vakalatnama* of the 1st April 1895 (Exhibit 20) he had authority to file petitions of compromise. The reasonable view is that

he made himself acquainted with the terms of the petition of compromise and filed it because he believed it to be in order; but he is now doing what he can to support the position taken up by the Defendant. That the Defendant did not cease to trust him is shewn by the fact that he drafted her written statement in the present suit and acted for her in the suit till cited as a witness by the Plaintiffs.

It is further clear that compromise was part of a policy of reconciliation between the parties. In 1896, Bhuban Babu, a pleader, had been trying to have disputes amicably settled, and in the following year, the year of the compromise in question, disputes in regard to a large number of villages were settled. A few appeals in cases between the parties were prosecuted, but generally speaking there was a settlement of disputes between them. Crawford says he was particularly insistent on having the land in suit No. 72 included in the compromise or he would not have compromised suit No. 73. These facts are sufficient answer to the argument that it was unlikely that the Defendant would have given up the land for which she had been and still was fighting Government.

There is no force in the argument that that part of the contract referred to in paragraph 8 of the petition cannot be enforced, as it was for a lease of accretions to Defendant's land, whereas in fact the land was found by the Privy Council to be a reformation *in situ*. It is clear, the parties contracted for a lease of the land which was the subject-matter of suit No. 72. A misdescription of it will not affect the contract, especially when it appears that the present Defendant was claiming the land in suit No. 72 on the alternative plea that it was either a reformation *in situ* or an accretion to her estate.

My learned brother has dealt with the questions of the terms on which the lease was to be given and of the Plaintiffs' title. On these points I have nothing to add.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES NOS. 1687, 1688 AND 1991 OF 1911.

CARNDUFF, J.
RICHARDSON, J.
1914,
Heard,
11, March.
Judgment,
23, March.

HEM CHANDRA CHOWDHURY, Defendant, Appellant,
v.
HEMANTA KUMARI DEBI, Plaintiff, Respondent.

Civil Procedure Code (Act V of 1908), Or. 2, r. 1—Partition, suit for, if lies without including the whole of the joint properties in the suit—Principle for Courts to follow in such cases—Bengal, Agra and Assam Civil Courts Act (XII of 1887), sec 37.

The Plaintiffs and the Defendants were the joint proprietors of a certain pargana which was partitioned by the Collector. At the time of the partition certain lands which were jungle or submerged were excluded from the partition, and kept joint. The Plaintiff brought three suits to have the joint lands partitioned.

Held—*That it cannot be said that the general rule is that a joint owner cannot claim a partition of the joint property without bringing the whole of it under partition. The rule to be applied is much more elastic and what the Court has to consider in cases of this kind under sec. 37 of the Bengal, Agra and Assam Civil Courts Act, 1887, is justice, equity and good conscience.*

This was an appeal preferred on the 6th of July 1911 against a decree of Mr. C. H. Moseley, District Judge of Zilla Mymensingh, dated the 4th April 1911, affirming a decree of Babu Latu Behary Bose,

Subordinate Judge of Mymensingh, dated 24th September 1910.

The facts will appear from the judgment.

Mr. Caspersz and *Babu Ramoni Mohan Chatterjee* for the Appellant.

Babus Kishori Lal Sarkar, Bepin Behary Ghosh and *Debendra Nath Bagchi* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CARNDUFF, J.—These appeals are preferred against three preliminary decrees for the partition of certain lands in the District of Mymensingh as appertaining to Pargana Pukhuria, of which the parties are the joint proprietors.

Pargana Pukhuria was partitioned by the Collector in the year 1839, when four separate estates were formed and allotted as follows:—Tauzi No. 132 to the Plaintiff's predecessor-in-interest: Tauzi No. 6100 to the predecessor of the second Defendant: and Tauzis Nos. 4806 and 5513 to the predecessor of the other Defendant. A considerable quantity of land in this pargana was, however, either jungle or submerged at the time, and this was, and apparently had to be, excluded from the partition. It consists of parcels in a large number of different mauzas, in which the nature and extent of the interest of the respective parties vary. As a rule the parties are the superior landlords. the Plaintiff's share being ten annas, the first Defendant's two annas, but in some mauzas the shares are different—in Mauza Sailarkhanda the Plaintiff and the first Defendant own eight annas each, the second Defendant not being a coparcener at all, in another mauza a twelve-anna share is monopolised by an idol, and in a third, the parties are talukdars. In three of the mauzas the lands are becoming culturable, and the allegation of the Plaintiff is that they are being taken possession of in a haphazard way as opportunity arises, and quarrels and obstacles to improvement have been the consequence. The Plaintiff, therefore, sought, by means of these three suits, to have all the joint lands in the three mauzas partitioned between herself and her co-sharer. To this, the second Defendant has raised no objection, but the first Defendant has, on the ground that separate suits for the partition of portions of the *ijmali* lands are not maintainable, and that one suit ought to have been brought for the partition of all the *ijmali* lands in the pargana which were omitted from the Collectorate partition of 1839. There were other points raised: but that is the main point, and it is the only one with which we are concerned in these appeals.

Mr. Caspersz, on behalf of the Appellant, contends that the general rule is that a joint owner cannot claim a partition of the joint property without bringing the whole of it into hotchpot, so that all the equities between the parties may be considered and settled and the matter may be dealt with once for all. And he further urges that the institution of suits for partition piecemeal involves multiplicity of actions and offends against the provisions of Or. 2, r. 1, of the Civil Procedure Code. In support of the appeal reliance is placed on several reported cases.

In *Jogendra Nath* v. *Jugobudhoo* (1), it was held (Petheram, C. J., doubting, but following authority) that a suit will not lie for partial partition. But the property here was the joint property of a Hindu family, and as the learned Vakil for the Respondent admits, the application of the general rule in such a case can hardly be denied. But that even then there may be an exception is shown by the next rul-

(1) I. L. R. 14 Cal. 122 (1886).

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ing, on which the learned Counsel for the Appellant relies, that in *Punchanan* v. *Shib Chandra* (2), in which Trevelyan, J., while mentioning the general rule against partial partitions, nevertheless entertained a suit for the partition of so much only of a Hindu joint estate as lay within the original jurisdiction of this Court.

In *Jogendra Nath* v. *Baldeo* (3), Mookerjee and Caspersz, JJ., observed that a co-owner cannot enforce a partition of a part only of the common lands leaving the rest undivided, and the entire property must be included in the partition. But the observation was incidental and parenthetical, the suit before the Court being one for the recovery of joint possession of some lands which had accidentally, as in this case, been excluded from the partition of the holding to which they appertained.

In *Fuzlur Rahman* v. *Fayzer Rahman* (4), Chitty and N. R. Chatterjea, JJ., expressed the view that there is "no distinction in principle between partition of joint property under Hindu or Mahomedan Law," and held that it was inexpedient to allow a suit for the partition of a portion only of joint property. But here their Lordships were dealing with family property, and, no doubt, very much the same considerations arise whether the joint family is Mahomedan or Hindu.

In *Satya Kumar* v. *Satya Kishore* (5), Mookerjee and Vincent, JJ., held that "although there cannot be a partial partition by suit," partial partition by private arrangement is allowable. But once more the property dealt with was that of a joint Hindu family.

In *Monsharam* v. *Ganesh Chandra* (6), Mookerjee and Beachcroft, JJ., remarked that, "when the Plaintiff sues for partition of a part of the joint property, it is open to the Defendant to take exception to the scope of the suit and to insist upon the inclusion of all the properties jointly owned by the parties." But the precise point before the Court was whether a person holding property jointly with another is precluded by sec. 43 of the Code of Civil Procedure, 1882, corresponding with Or. 2, r. 2, of the present Code, from suing for a partition of it by reason of its having been the subject-matter of a previous partition-suit between the parties.

These are the strongest cases on the side of the Appellant. On the other side there are *Padmamoni* v. *Jagadamba* (7), *Ram Mohan* v. *Mulchand* (8) and *Abul Faiz* v. *Asita Mohan* (9). In the first of these, Phear, J., laid it down that one of two coheiresses to a joint Hindu family property is not obliged to include in her suit the whole of the property, but may confine it to the portion which she is desirous of having partitioned, although it is open to the defence to show that the portion ought not to be divided or could not properly be divided, and that a fair and equitable division could not be made without bringing in all the joint property. In the second, the Allahabad High Court expressed entire concurrence with the view of Phear, J., held that the purchaser of certain shares in two shops was rightly decreed partition of the share purchased by him in one of them, and observed that "there is nothing to preclude one of the joint owners of several items of property from seeking a partition of one of such items." In the third, this Court followed the Allahabad Court and ruled that one of the co-owners

(2) I. L. R. 14 Cal. 835 (1887).
(3) I. L. R. 35 Cal. 968 (1907).
(4) 15 C. W. N 677 at p. 679 (1911).
(5) 10 C. L. J. 503 (1909).
(6) 17 C. W. N. 521 at p. 522 (1912).
(7) 6 B. L. R. 124 (1871).
(8) I. L. R. 28 All. 39 (1905).
(9) 12 C. W. N. 640 (1908).

of an estate could sue for the partition of the *chaukidari chakran* land appertaining to one mauza in the estate.

In the result, I think that the learned Counsel for the Appellant has not been able to establish the broad proposition for which he contends, and that the rule to be applied is much more elastic. Indeed, what we have to consider in cases of this kind, under sec. 37 of the Bengal, Agra and Assam Civil Courts Act, 1887, is justice, equity and good conscience; and these seem in this case to lie entirely on the side of the Plaintiff. So far as appears, the Rani has brought her suits in respect of the only *ijmali* lands regarding which any difficulty has so far arisen, and a suit in respect of the others might be premature and infructuous. For there is nothing to show that other lands not included in the partition of 1839 have emerged and become culturable or capable of partition, and the suggestion that there may be such other lands is a mere surmise. *A fortiori*, there is no substance in the contention that the Rani may be in possession of more than her fair share of culturable lands in other villages, so that, without bringing all into hotchpot, she cannot establish her right to a particular share in the lands which have become culturable in the three mauzas—Char Magura, Mirzapur and Sailarkhanda. And, as regards the apprehension as to multiplicity of suits, there is really no foundation for the objection if we look at the facts in connection with, say, appeals Nos. 1687 and 1991 relating to Char Magura and Sailarkhanda. In the former mauza the Rani has ten annas, the second Defendant two annas, and the Appellant four annas. In the latter the Rani holds eight annas and the Appellant holds the other eight. If one suit were brought in respect of both mauzas, there might no doubt, be one preliminary decree, but the final decree would depend on the results of two entirely distinct enquiries by the Commissioner appointed to effect the partition.

On the whole, I am of opinion that the Appellant is merely obstructive, that there are no merits in his appeals, and that they should be dismissed with costs.

RICHARDSON, J.—I agree.

Appeals dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 196 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 26 and 27, January.
Judgment, 27, January.

CHAMED SHEIKH, Appellant,
v.
NABA GOPAL GHOSH and ors., Respondents.

Bengal Tenancy Act [*VIII of 1885, as amended by Act I* (*B. C.*) *of 1907*] *secs. 153, 143, sub-sec.* (*2*) *—Civil Procedure Code* (*Act V of 1908*), *Or. 43, r. 1, cl.* (*t*)*—Appeal against dismissal of suit for recovery of arrears of rent or less than Rs. 100, ex-parte decree in—Order refusing application for re-hearing of appeal, if appealable—Suit, meaning of, if includes appeal—Application for re-hearing of appeal, if an application in the suit—Civil Procedure Code, application of, to suits between landlord and tenant.*

A suit for recovery of arrears of rent for less than Rs. 100 was dismissed on the merits. The Plaintiff's appeal against this decree was decreed ex parte. *The Respondent's application under Or. 41, r. 21, C. P. C., to have the appeal re-heard in his presence having been refused an appeal was preferred against this order to the High Court:*

Held—*That sec. 153 of the Bengal Tenancy Act was a bar to the appeal.*

The term "suit" includes the appellate stage, and an application to re-hear

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the appeal is clearly an application in the suit.

Sub-sec. (2) of sec. 143 of the Bengal Tenancy Act, which makes Or. 43, r. 1, cl. (t), C. P. C., applicable to suits between landlord and tenant, makes it applicable subject to the operation of the restrictive provision of sec. 153 of the Bengal Tenancy Act, and the absence of the restrictive words "in a case open to appeal" from cl. (t) does not give the right of appeal.

This was an appeal preferred on the 24th of April 1912 against an order of Babu Chandra Bhusan Banerjee, Subordinate Judge of Zilla Khulna, dated the 26th of January 1912.

The facts of the case will appear from the judgment.

Babu Bimal Chandra Das Gupta for *Babu Jadu Nath Kanjilal* for the Appellant.

Babus Narendra Chandra Bose, Charu Chandra Biswas and *Sarat Chandra Mukerjee* for the Respondents

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendant against an order by which the Court of Appeal below has refused to re-hear the appeal heard *ex parte* in his absence. The suit was for recovery of arrears of rent ; the claim was valued at less than Rs. 100 in the Court of first instance and was dismissed on the merits. The Plaintiffs appealed against this decree of dismissal. At the hearing of the appeal, the Respondent was not represented and the appeal was decreed *ex parte*. He then made an application under Or. 41, r. 21, of the Code of Civil Procedure to have the appeal re-heard in his presence. The Court refused the application. The present appeal is directed against that order.

The first question for consideration is, whether the appeal is competent. Under sub-sec. (2), sec. 143, of the Bengal Tenancy Act, the Code of Civil Procedure applies to all suits between landlord and tenant subject to any rules made by the High Court under sub-sec. (1) and subject also to the other provisions of the Bengal Tenancy Act. On behalf of the Appellant it has been argued that the order in question is open to appeal under Or. 43, r. 1, cl. (t) of the Code of Civil Procedure. But before this contention can be accepted, we must examine, whether there is any provision of the Bengal Tenancy Act which bars the right of appeal. In our opinion, sec. 153 is clearly a bar. That section provides that an appeal shall not lie from any order passed, whether in the first instance or on appeal, in any suit instituted by a landlord for the recovery of rent, when the order is passed by a Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100, unless the order has decided one or more of certain specified points. It is not suggested that the order against which the present appeal has been preferred decides any question of this character. The point for consideration therefore reduces itself to this :—Is this an order passed in a suit instituted by a landlord for recovery of rent? The learned Vakil for the Appellant has not disputed that the term "suit" includes the appellate stage. This indeed is clear from the decision in the case of *Gagan Chand* v. *Caspersz* (1) and *Batasa Sarkar* v. *Jaili Bewa* (2). In fact it has been held in the case of *Shyama Churn* v. *Debendra Nath* (3) that the term "suit" includes even the execution-pro-

(1) 4 C. W. N. 44 (1897).
(2) 3 C. W. N. 62n (1899).
(3) I. L. R. 27 Cal. 484 : s. c. 4 C. W. N. 269 (1900).

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ceedings based on the final decree made in the suit. It has been argued, however, that an application to re-hear an appeal is not an application in the suit, but is an extraneous proceeding which, if granted, in effect revives the appeal. In our opinion, there is no force in this contention, and the application to re-hear the appeal is clearly an application in the suit. This view is supported by the decision in the case of *Acha Mian* v. *Durga Charan* (4) where it was held that an application to review an order made in a suit is a proceeding in the suit itself. The case before us is obviously very much stronger. Finally, we have been invited to contrast the language of cl. (*t*) of r. 1 of Or. 43 with that of cls. (*c*), (*d*) and (*n*) and to hold that the absence of the restrictive words "in a case open to appeal" from cl. (*t*) supports the right of appeal claimed by the Appellant. But this contention is obviously fallacious: the crucial point of the matter is that sub-sec. (2) of sec. 143 of the Bengal Tenancy Act which makes Or. 43, r. 1, cl. (*t*) of the Civil Procedure Code applicable, makes it applicable subject to the operation of the restrictive provision of sec. 153 of the Bengal Tenancy Act.

It follows that this appeal must be deemed barred under sec. 153 of the Bengal Tenancy Act and consequently dismissed with costs. We assess the hearing fee at one gold mohur.

Appeal dismissed.

(4) I. L. R. 25 Cal. 146 : S. C. 2 C. W. N. 137 (1897).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE
No. 295 OF 1910
AND
APPEAL FROM ORDER
No. 653 OF 1911.

FLETCHER, J.
N. R. CHATTERJEA, J.
1914,
Heard, 4, 5 and 6, March.
Judgment, 27, March.

KANAI LAL JALAN, Claimant No. 1, Appellant,
v.
RASIK LAL SADHUKHAN & Claimants Nos. 2 to 5, Respondents.

Res judicata—*Termination of tenancy by decree on prior mortgage—Fixture, right of tenant to remove—Transfer of Property Act (IV of 1882), sec. 108—Acquisition of land with building by Government—Tenant if only entitled to price of material—*Benamdar, *mortgage-decree against, if binds beneficiary.*

The Appellant purchased a plot of land at a sale held in execution of a mortgage-decree. In the mortgage-suit the Plaintiff-mortgagee's case was that the tenant-Defendants to that suit had taken their tenancies from the mortgagor after the date of the mortgage and the mortgagee prayed for the sale of the property free from the tenancies. The case set up by one of the Respondents who was the elder brother of the other Respondents was that they held a permanent tenure created prior to the mortgage which was confirmed by a confirmatory lease after the mortgage and that they had erected a masonry building on the land. Issues were framed on this point and the Court found in favour of the Plaintiff-mortgagee, and in execution of the mortgage-decree the property was sold free of all encumbrances and purchased by the Appellant. Subsequently a portion of the land so purchased by the Appellant was acquired under the Land Acquisition Act and the Respondents put in

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a claim for the compensation-money alleging that they had a permanent mokurari maurasi *interest in the land the tenancy standing in the name of the elder brother.*

Held—*That the matter was directly in issue in the former suit and decided against the Respondents and they could not open the question again.*

Held *(as to the contention that under sec. 108 of the Transfer of Property Act, the right of the tenant to remove fixtures must be exercised during the continuance of the lease)—That the provisions of sec. 108 of the Transfer of Property Act are subject to local usage, and in the present case the leases not being determined by any notice to quit and the decree in the mortgage-suit under which the Respondents lost their right not having given them an opportunity to remove the building, they should be allowed to remove them unless the Appellant chose to take them on payment of compensation.*

In the circumstances of the case, the Respondents were given one-half of the amount awarded on account of the building.

The view taken in RAM BEHARI SARKAR *v.* SURENDRA NATH GHOSE (3) *that a* benamdar *defendant in a mortgage suit represents the interests of the persons beneficially entitled, approved.*

This was an appeal preferred on the 6th July 1910 against a decree of Mr. W. N. Delevingne, District Judge of Hooghly, dated 2nd April 1910.

The Appellant purchased a plot of land at a sale held in execution of a mortgage-decree. In the mortgage-suit the Plaintiff-mortgagee prayed for the sale of the mortgaged property free of all encumbrances. His case was that the tenants who were on the land and who were party-Defendants to the suit had acquired their tenancy from the mortgagors subsequent to the mortgage. The Respondent Rasik Lal, who was the elder brother of the other Respondents, filed a written statement to the following effect :—

"That out of the properties in dispute, 6 cottahs of land were held since a good long time, even from the time of the ancestors of the principal Defendants, by one Nitai Charan Rana in *mokurari maurasi jamai* right at an annual rent of Rs. 13, 14 and, on his death ,the said land devolved on his heir Kali Das Rana in the aforesaid right; and on the death of Kali Das Rana his sons and heirs Lakshmi Narain Rana and others came into possession of the same and while so doing made several successive mortgages of the said right with Gujarmall Marwari of Sulkea, and finally sold the same for the satisfaction of the said mortgage-debts to this Defendant on the 26th day of Jaista 1305 (B. S.) for the consideration of Rs. 1,700. Subsequently this Defendant has secured from the Defendants Nos. 1 and 2 a *mokurari maurasi patta* at the old rent, by way of procuring the registration of his own name (in the landlord's *sherista*) on the 1st Sraban 1305 (B. S.). So the said land cannot be sold away for the mortgage-debts alleged by the Plaintiff to the destruction of this Defendant's rights.

"That out of the said 6 cottahs of land a certain portion remained in the *khas* possession of the said Kali Das Rana and of his sons on his demise. And a certain portion of the said land remained in the possession of Bhabatarini Dasi and Nistarini Dasi in *korfa dar-mokurari* right who erected masonry buildings thereon. There was litigation between the said Kali Das and Nistarini up to the Hon'ble High Court in which the *kayemi* right of the said Bhabatarini and others was upheld. Thereafter the said Bhabatarini sold the said right on the 13th Magh 1284 (B. S.)

(3) 17 C. L. J. 34 (1913).

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to Idan Bibi in the *benami* name of her son Dedar Buksh for the consideration of Rs. 701, and while the said Idan Bibi held it in possession in the aforesaid right, she died, and her heirs sold the said right on the 22nd Jaista 1304 (B. S.) to one Dinanath Sanyal in the *benami* name of Jagabandhu Chakravarti; and the said Dinanath Sanyal afterwards sold the aforesaid right to the father of this Defendant for the consideration of Rs. 900, and the masonry building thereon was purchased at a court-sale by one Haridas Ghosh, who sold the said masonry building to the father of this Defendant, and, on his death, this Defendant, as the heir of his father, came to hold it in his possession, and he has been since holding the said 6 cottahs of land in possession, having erected thereon a three-storied masonry building at an estimated cost of above Rs. 20,000.

"That this Defendant had no knowledge of the mortgage to the Plaintiff. He honestly believed that the principal Defendants were the full owners, and so obtained of them the *patta* on the mutation of names at the old rent, and this Defendant in good faith spent about Rs. 20,000 on the said property and effected its improvement. In the aforesaid circumstances the said property cannot be sold away in satisfaction of the mortgage-debt alleged by the Plaintiff in annihilation of this Defendant's rights."

Issues were framed on the point raised and the Court held that the tenant-Defendants were subsequent encumbrancers and ordered "that the suit be decreed with cost and interest calculated at the bond rate till the date of realisation. If the decretal amount be not paid within three months then the mortgaged properties are to be sold free of encumbrance. The subsequent encumbrancers including the lessees can either redeem the Plaintiff or share in the surplus sale-proceeds, if any, according to their priority."

In execution of this decree the property was sold and purchased by the Appellant. Subsequently, the land came to be acquired under the Land Acquisition Act. The Respondents put in a claim for the compensation-money on the ground that they had a permanent *mokurari maurasi* interest in the land on which their dwelling house stood, the tenancy standing in the name of Rasik Lal the elder brother, and they were entitled to get the entire amount of the compensation for the land and building under sec. 18 of the Land Acquisition Act. There was a reference to the District Judge who held as follows:—"Finding that the tenancy is a permanent one, but that the rent is liable to enhancement, I divide the compensation awarded for the land acquired between the landlord and the tenant in the proportion of 1 to 2. I find further that the tenants are entitled to the whole of the compensation for the structures on the land." Against this decision the Appellant preferred an appeal to the High Court.

Dr. Rashbehari Ghosh and *Dr. Sarat Chandra Basak* for the Appellant.

Mr. Pugh, Babus Dwarkanath Chuckerbutty, Mohendra Nath Roy and *Kali Kinkar Chuckerbutty* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

These two appeals have been heard together, and we shall deliver one judgment in the two appeals as the points that have been raised and argued are common to both. The Appellant before us acquired his interest in the property at a sale held in execution of a mortgage-decree on the 17th June 1907.

The main question before us is—are the Respondents estopped from raising the

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question as to whether the interest that the Appellant purchased at the sale in execution is subject to a permanent tenancy in favour of the Respondents? But before considering the main question raised in the appeal No. 653 of 1911, we will dispose of an objection that has been raised to the competency of that appeal.

The case out of which the appeal No. 653 of 1911 arises has been before this Court. On that occasion, the case was remanded to the lower Court and directed to be re-heard.

On the former appeal to this Court, an objection was taken as to the competency of the appeal; but that objection was overruled and this case together with other analogous cases was remanded to the lower Court with this direction "that these appeals must be allowed and the cases remanded to the Court below in order that the applications may be dealt with as proper applications under sec. 244 of the Civil Procedure Code."

Sec. 244 of the old Code is for the present purposes in identically the same terms as sec. 47 of the present Code. The Respondent, however, objects that the present application is one under Or. 21, r. 98, of Sch. I to the Code of Civil Procedure and that therefore there is no appeal from the order of the lower Court.

Having regard, however, to the terms of the order remanding the case to the lower Court and to the fact that the proceedings in that Court are headed as being under sec. 47 of the Code of Civil Procedure, we do not think it is open to us to go into the matter. We therefore overrule the objection as to the competency of the appeal.

No such objection arises in the other appeal that is now before us which is an appeal from an original decree. Now, as we have already stated, the Appellant purchased the property at a sale in execution of a mortgage-decree. That sale took place in a suit (No. 57 of 1904), and the Respondent Rasik Lal Sadhukhan was Defendant No. 23 in that suit.

By the plaint in that suit, the Plaintiff in para. 7 alleged that the tenant-Defendants to that suit had taken their tenancies from the mortgagor after the date of the mortgage to the Plaintiff and accordingly he prayed amongst other reliefs that the property might be sold free from the tenancies. By para. 3 of his written statement filed in that suit, the Respondent Rasik Lal alleged that he had acquired the interest of certain persons named Rana which was a permanent tenancy in a portion of the property, and subsequent to the mortgages he had obtained from the mortgagors a *patta* at the same rent.

It appears to us to be quite clear that the case the Respondent Rasik Lal was setting up in his written statement was that he held a permanent tenure created prior to the mortgages which was confirmed by a confirmatory lease after the date of the mortgage.

The issue settled in that suit comprised the following issue—No. 11: Are the leases created by Defendants Nos. 1 and 2 in favour of the tenant-Defendants, including Defendants Nos. 4 and 5 after the mortgages in suit, valid and binding on the Plaintiff? Are the properties saleable under the Plaintiff's mortgages free from all incumbrances under the said leases? Are some of these leases prior to the Plaintiff's mortgages?

By his judgment in that suit the learned Judge found in answer to the issue No. 11:—"The other Defendants are subsequent incumbrancers and they can redeem the Plaintiff's mortgage, if they like, or share in the surplus sale-proceeds."

By the decree passed in that suit, it was ordered that "in default of payment to the

KANAI LAL JALAN *v.* RASIK LAL SADHUKHAN.

Plaintiff of the amount therein mentioned, the mortgaged properties will be sold free from all incumbrances." The property was subsequently sold by order of the Court and the Appellant became the purchaser.

The sale-certificate to him is dated the 3rd October 1907, and is not made subject to any tenancies whatsoever. On these facts it seems to us clear that the Respondents are now estopped from saying that their tenancy is prior to the interest purchased by the Appellant at the sale by the Court.

This matter is, in our opinion, directly in issue in the former suit and decided against the Respondent Rasik Lal, and the decree in that suit ordered the sale of the property free from the tenancies which were set up by the Respondent Rasik Lal in his written statement. In our opinion it is not open to the Respondent to go into the question again on these present appeals.

As to the other questions that have been raised in these appeals, the next question is as to the right of the Respondents to the buildings on the land.

It is contended on behalf of the Appellant that under sec. 108, cl. (*h*), of the Transfer of Property Act, the right of the tenant to remove fixtures must be exercised during the continuance of the lease. But the provisions of the section are subject to local usage. In the case of *Ismai Kani Rowthan* v. *Nazarali Saheb* (1), it was pointed out that the section only provides for the tenant removing fixtures during the continuance of the lease, and nothing is said as to the rights of the parties in respect of such things after the determination of the lease, if they have not been already removed by the lessee. The learned Judges observed as follows :— "The question may arise whether the tenant forfeits all his rights in such things if he has not so removed them, and in the absence of any contract on that point, the question will have to be solved with reference to the 'local usage,' whatever may be the precise sense in which that expression is used in sec. 108. According to the customary or common law of the land as laid down in *In the matter of the Petition of Thakoor Ch. Pramanik* (2) the option in such cases will be with the lessor either to take the building on paying compensation, or if he is unwilling to pay compensation to allow the tenant to remove the building." In that case the lessor did not object to the removal of the building, and the only question was, whether the tenant was entitled to compensation and the question was decided against the tenant. But the view taken of the right of the tenant to remove buildings if he has not removed them before the determination of the lease appears to be an equitable one and in accordance with the usages and customs of the country as laid down by the Full Bench in the case of *Thakoor Pramanik* (2). The leases in these cases were not determined by any notice to quit, and the decree in the mortgage-suit, under which the Defendants lost their rights, did not give them any opportunity to remove the buildings. Under the circumstances, we think they should be allowed to remove the buildings (three months' time being allowed for the removal thereof) unless the Appellant chooses to take the buildings on paying compensation.

The building of the Respondents in Reg. Appeal No. 295 of 1910 has however been acquired under the Land Acquisition Act, and Rs. 3,621-6-7 has been awarded as compensation for the building. It is contended on behalf of the Appellant that the Respondent is entitled (if at all) to the value of the materials

(1) I. L. R. 27 Mad. 211 (1903).

(2) B. L. R. (F. B.) 595 at p 597 (1866).

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only after the demolition of the building. Under the peculiar circumstances, we think that the Respondents should get one-half of the amount awarded on account of the building under the Land Acquisition Act. As for the compensation allowed for the land, we think the Appellant is entitled to the whole of it. Interest will run on the said amounts at the rate of six per cent. per annum from the date, when the said amounts were withdrawn by the Respondents till the date of payment. Another point, that was raised in the appeal No. 295 of 1910, was that as the Respondent Rasik Lal was merely a *benamdar* for his father, the estoppel created against him by the judgment and decree in the mortgage-suit does not bind the other Respondents to appeal No. 295 of 1910.

But in our opinion that is not so.

We agree with the view expressed by Mookerjee, J., in *Ram Behari Sarkar* v. *Surendra Nath Ghose* (3) that the *benamdar*-Defendant in the mortgage-suit represented the interests of the persons beneficially entitled. In the result, the order and decree appealed from must be varied in accordance with the above remarks.

There should be no order as to the costs of this appeal or of the proceedings of the Court below.

Decree varied.

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM ORIGINAL DECREE
No. 270 OF 1911.

HOLMWOOD, J.
CHAPMAN, J.
1914,
Heard, 1, July.
Judgment, 6, July.

MONORAMA CHOWDHRANI, Petitioner, Appellant,
v.
SHIVA SUNDARI MAJUMDAR, Opposite Party, Respondent.

Will—Revocation of probate after many years—Onus on Petitioner to offer reasonable explanation of delay.

(3) 19 C. L. J. 34 (1913).

Where the Petitioner comes to Court after considerable delay, and knowledge of and acquiscence in the grant of probate on his part are shown, the Court will not allow him to re-open the probate unless he offers some reasonable and true explanation of the delay.

This was an appeal preferred on the 13th July 1911 against a decree of Mr. A. H. Cumming, District Judge of Zilla Noakhali, dated the 15th of May 1911.

In this case the Petitioner applied under sec. 50 of the Probate Act to set aside a probate and to call on the probate-holder (the executor) to prove the Will in proper form in the presence of the Petitioner.

The testator, the father of the Petitioner, died in December 1883, leaving a widow and five minor daughters as well as two brother's sons. Application was made by the widow for the probate of the Will. There was no opposition, and the Will was proved and probate was granted in common form in 1884 to the widow. By the Will the widow got a life-estate with remainder to the brother's sons and the daughters were given allowances for maintenance at Rs. 12 a year. It appeared that general citations were issued, but no guardian *ad litem* was appointed to represent the minors on whom there was no service. At the time of her father's death in 1883, the Petitioner was about eight years of age. On the 17th March 1910, she filed her application for annulment and revocation of the probate granted to her mother. Her allegation was to the following effect :—

"The Petitioner had learnt that with a view to deprive the Petitioner's father's heirs, including the Petitioner, of their just inheritance and in order that his property might not be inherited by the heirs, but might be taken by his nephews, the relations of the Petitioner's father in collu-

sion with his nephews and servants of the estate had falsely got up and set up after his death a Will, purported to be executed by the Petitioner's father while lying in the boat on his death-bed, and applied for the probate or letters of administration under the said forged and fabricated Will to this Honourable Court in the name of the Petitioner's mother as executrix or legatee thereof (who being a simple-minded lady, the Petitioner has reason to believe that the Petitioner's mother was not aware of these under-hand transactions) and without issue of any citation to the Petitioner and the parties interested in inheritance and on false representation and concealment of material and important facts fraudulently obtained probate of the said forged Will from the Court in case No. 34 of 1884 on the 25th February 1885.

"The Petitioner's mother was a young and uneducated *pardanashin* Hindu lady at the time of the Petitioner's father's death and on the death of her husband, she lived in the Petitioner's father's house in joint mess with the nephews of the Petitioner's father and under the absolute control of them and their mother, the sister-in-law of her, who was the widow of the Petitioner's father's brother. These relations with the assistance of the old servants of the estate used the Petitioner's mother as a mere tool in their hands and they had everything in their own way.

"Some years after the death of the Petitioner's father the Petitioner has been married to Babu Ananda Chandra Choudhuri, who comes of a very respectable family, though comparatively poor and living at a long distance from the Petitioner's father's house.

"The other sisters of the Petitioner, of whom only three are living, have all lost their husbands before any issue was born to any of them.

"The Petitioner since her marriage was living all along with her husband at Lukhipur in the District of Noakhali and until very recently was not aware of any such fabricated and forged Will, and the fraudulent probate which was purposely kept concealed from the Petitioner by those relations of the Petitioner's father, and the mother of the Petitioner also did not inform the Petitioner anything about the said Will or probate, either from ignorance or in collusion with those relations.

"The Petitioner has now come to know on enquiry during her last visit in her father's house in Kartik last, about the propounding of the fabricated Will of her father and of the probate case as mentioned above and about all the transactions relating to the said case and therefore beg to apply to this Honourable Court for the revocation and annulment of the said probate obtained in the name of the Opposite Party."

The District Judge dismissed the Petitioner's application and against this decision of the District Judge the Petitioner appealed to the High Court.

Babus Dwarka Nath Chuckerbutty and *Ramesh Chandra Sen* for the Appellant.

Messrs. Caspersz, A. Yusuf and *Babu Upendra Kumar Ray* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This was a suit for revocation of probate of the Will of one Gobinda Chandra Das Majumdar calling upon the executor to the Will in the presence of the Petitioner.

The testator died on the 27th or 28th December 1883 of Cholera in a boat, and the Will was said to have been executed on the 27th December 1883. He left a widow and five minor daughters unmarried as well as two brother's sons, the objectors

in this case, who were then also minors. By the Will the widow got a life-estate with remainder to the brother's sons, and the daughters were given allowance for maintenance of Rs. 12 a year each. The Petitioner Monorama Chowdhrani is the only one of the daughters who has borne sons, and she claims to come in, because, admittedly although general citations were issued and her mother obtained probate of the Will, no separate guardian *ad litem* was appointed to represent the minor daughters or the minor brother's sons in the probate-proceedings. The eldest daughter Kusum Kumari, now a childless widow, was born about 1869: the elder brother's son Sashi Mohan Das Majumdar was born in 1872: the second daughter Kumudini was born in 1871: the Petitioner was born in 1876: the fourth daughter Kadambini was born in 1880 and the younger brother's son Kamini Mohan Majumdar was born in 1883. The fifth daughter is dead.

It is fully established by evidence that Siva Sundari, the widow of the testator, took out probate on the 20th March 1881, and in a rent-suit in 1886 the Will was filed by her confidential servant Kali Kanta Biswas and returned to her. In 1887, the Petitioner, then 11 years of age, was married, and there is evidence that the Will was read out to her husband, a pleader's clerk, who has since become a vernacular copyist in the Munsif's Court at Lukhipur and herself at the time of the marriage. In accordance with the terms of the Will, Kusum Kumari, one of the daughters, gave receipts for her allowance to her mother in 1887, and to her mother and *khuri*, the mother of the objectors, jointly for the years 1888 and 1891. Two subsequent receipts of her, the first given to her mother and Sashi Mohan jointly, and the second to her mother alone have also been produced. Receipts of a similar nature granted by Kumudini for 1890 and 1901 are produced and from Kadambini for 1903. But the most important document is the receipt given by the Petitioner herself in 1901 for Rs. 200 being the arrears of her maintenance for 16 years from 1885 to 1900 and three-quarters of her allowance of 1901. All these receipts clearly recite that her father Gobinda before his death executed a Will on the 18th Pous 1290, and in the said Will he made directions for payment of Rs. 12 annually to the recipient as allowance out of the profits of the estate. In 1909, the objectors Sashi Mohan and Kamini Mohan had occasion to bring a suit for accounts against Kali Kanta Biswas, who was managing for Siba Sundari and for their own mother, and they made Siba Sundari a Defendant also. This appears to have annoyed Siba Sundari, who separated from her sister-in-law and the objectors, and went over to the side of the Petitioner and her husband, and in 1910, this petition was brought making Siba Sundari alone a party. Upon this, the objectors came in and said, that the petition was fraudulent and collusive and got up by Siba Sundari. At the trial Siba Sundari and all the surviving daughters denied the Will altogether and denied they had received any allowance, and supported the Petitioner in her allegation that she had no knowledge of the Will of her father or of the probate case until Kartik 1316, when she went to visit her father's house.

As regards the facts, we may at once say that we have carefully perused the documents and can have no doubt that the receipt (Ex. A) is in the handwriting of the Petitioner herself, and the other receipts are genuine. Numerous specimens of the handwriting of the ladies have been

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NOTES.

Germany's paper-blockade of British Isles.

The new method of blockade that is proposed to be adopted by Germany is unprecedented in International Law. No doubt Germany has every right to blockade the British Isles effectively, if she may, and stop the neutral vessels running the blockade. With regard to British vessels she is surely within her rights to sink them even by sub-marines and torpedoes, after giving notice or taking such steps as may be necessary for the safety of civilian crew. But she has no right to attack the neutral vessels in the High Seas all round the British Isles, unless her alleged blockade is effective. Neutrals are not bound to accept her paper-blockade in the absence of her war-vessels guarding all the approaches of British ports. The lurking of a few sub-marines in obscure places cannot be accepted as evidence of effective blockade. Germany may as well say that since she can destroy neutral vessels by throwing bombs on them from above, her blockade of the High Seas should be recognised by neutrals. Effective blockade presupposes presence of war-vessels, and not mere chance-presence of instruments of destruction above or below the surface of water. In the absence of effective watch and guard, neutrals are not bound to recognise effective blockade.

In the absence of effective blockade Germany has no right to torpedo a neutral vessel without exercising her right of search first and asking the vessel to follow the captor to some German port for adjudication of her cargo and, if the same be of a contraband or a qualified contraband nature, its confiscation by the orders of a Prize Court. If the neutral vessel refuses to follow or, through stress of weather or some other inevitable cause, the captor is unable to take her to home port and there is no question of the cargo being of a contraband nature, she may be justified in sinking the netural vessel after ensuring the safety of her crew and taking care to preserve the ship's papers as a proof of her *bonâ fides* in the matter. But even then a neutral power would be justified in claiming compensation both for the vessel and the cargo and the matter would eventnally have to be submitted to a Prize Court for peaceful adjudication or the neutral power would be justified in going to war for the outrage.

Germany has put forward as an excuse for her new pretentions the fact that British vessels have been sailing under neutral flags and that it is not possible for her to distinguish enemy vessels from neutral vessels and as it is within her obvious rights to destroy enemy vessels, it is possible for her to sink a neutral vessel if she comes within the war zone, which she might say, she has sufficiently clearly indicated. But belligerents are entitled to resort to any ruse they please, and the neutrals cannot be made to suffer for that. So Germany's declaration is surely meant to be more of a bluff to create a scare than anything else. Her idea surely is that as in land if any neutral subject enters the war zone and seeks to trade with the enemy, he does so at his risk, so since she has included the British Seas within the operation of her naval forces, a neutral vessel entering the zone would incur similar risk. Very likely Germany would also say that if she sank any neutral vessel by mistake believing her to be an enemy vessel sailing under false colours, she would be prepared to compensate the neutral power, if the ship's papers showed a clean bill. But the rules of land warfare have never been extended to the High Seas

which is nobody's property and which, so far as the neutrals are concerned, they are entitled to use as public highways both in times of peace and war subject to right of the belligerents to search. Besides, the English Channel can never be closed by either belligerent to neutral commerce. They can surely exercise the right of capture and right of search. The Channel is one of the International highways. So the neutral powers are, we presume, not at all prepared to accept these new pretentions of Germany without active protest. But Germany commenced this war by a violent violation of the rights of Belgian neutrality, and as her statesmen and savants have fallen back on the primitive principle that nothing is too mean to crush an enemy, she seems to be decided in setting at naught every rule of morality and good faith in the course of progress of this war. So all right-thinking people are bound to join in the common cause of crushing an unrighteous enemy.

TERMINOLOGY OF LEGAL SCIENCE.

The Terminology of Legal Science is the subject discussed in an interesting article published in the November number of the *Harvard Law Review*. The author begins by saying that the two languages best fitted by circumstances as tools in scientific discussions are English and Japanese, because they can draw traditionally upon two entirely distinct stocks of language-roots for the formation of terms. English law, it is said, has never developed a scientific terminology. Its French roots went to form the popular and unscientific law-language and the advantages of the English language have never been utilised for legal science while the other sciences have freely made use of them. The author strongly urges a movement about developing a proper terminology—a legitimate enterprise for philosophers and jurists.

The terminology proposed is as follows :—

The science of law as a whole may be termed Nomology.

The science may be classified according to the different activities of thought which deal with the fact of law. These are four :—

Law may be conceived of as :

(1) A thing to be ascertained as a fact of human conduct; this branch to be termed Nomo-scopy ;

(2) A thing [illegible] be questioned and debated as a rule which by some standard might be different from what it is ; this branch to be termed Nomosophy ;

(3) A thing to be taught as a subject of education; this to be termed Nomo-didactics :

(4) A thing to be made and enforced by the state organs ; this to be termed Nomo-practies.

Nomo-scopy has three branches of activity :—

(a) It may concern itself with ascertaining the actual law of a given moment by studying the sources in which the existing law is to be found—statutes, decisions, customs, decrees, etc. ; this to be termed Nomo-statics.

(b) It may concern itself with the former condition, history and development of a rule of law ; this to be termed Nomo-genetics.

(c) It may concern itself with the relation between law and other facts and it is to be termed Nomo-physics.

Nomo-scopy has three branches of activity :—

(a) It may take a standard of logic, analyse the rules of law and examine their consistency as a system ; this to be termed Nomo-critics.

(b) It may by a standard of ethics (whether divine, moral or social) examine their conformity to that standard; this to be termed Nomothetics.

(c) It may by a standard of economics or other policies of social welfare examine their conformity with this standard; this to be termed Nomo-politics.

Nomo-didactics has a single branch only and Nomo-practics has three branches of activity :—

(a) It may be considered as a rule requiring to be particularised and applied in specific controversies and realised in concrete instances, thus giving rise to the judicial function including the advocates and other Court-officers ; this to be termed Nomo-dikastics.

(b) It may be considered as a rule requiring to be formulated by some form of expression of the State's will, thus giving rise to the legislative function and its methods; this to be termed Nomo-poeetics.

(c) It may be considered as a rule of action for various officers having duties under it thus giving rise to the executive function ; this to be termed Nomo-drastics.

The writer concludes by saying

"Take any page of juristic writing and see for oneself how much ambiguity is cleared up by keeping separate these different aspects of legal science."

CURRENT INDIAN CASES.

(CIVIL.)

Company—Allotment of shares.

CHANGA MAL *v.* THE PROVINCIAL BANK, LIMITED, I. L. R. 36 All. 412.

The allotment of shares by an irregularly constituted Board of Directors is invalid, but if the Articles of Association of a Company validate an act done by a *de facto* Director in a *bonâ fide* manner, the Courts will uphold his act.

Succession Certificate Act (VII of 1889), secs. 16, 18.

RUPAN BIBI *v.* BHAGELU LAL, I. L. R. 36 All. 423.

A certificate granted under the Succession Certificate Act is conclusive as against the debtors under sec. 16 of the Act. It can be revoked by the District Court under sec. 18 of the Act, but no suit will lie to have the certificate and the decree set aside on the mere ground that the certificate was obtained by the use of false evidence.

Civil Procedure Code, sec. 11—Res judicata.

MUHAMMAD AMIR *v.* SUMITRA KUAR, I. L. R. 36 All. 424.

The Plaintiffs as members of the Mahomedan community claimed a declaration that a certain mausoleum together with a flower garden and an imambara were *wakf* property. It appeared that previously two persons as members of the Mahomedan community had brought a suit in respect of certain property which included the property in suit against the predecessors-in-title of the present Defendants. Both claimed that the property was *wakf* and one of them claimed that he was the Mutwalli. In that suit it was held that the Plaintiffs had failed to prove that the property or any part thereof was *wakf*.

Held—That the subsequent suit was barred by the principle of *res judicata*.

Specific Relief Act (I of 1872), secs. 15, 17.

GOBINDA *v.* APOTH SAHAYA, I. L. R. 36 Mad. 403.

Sec. 17 distinctly prohibits a Court from directing the specific performance of a part of a contract except in accordance with the preceding sections. Even in cases where the conditions of sec. 15 are fulfilled, the use of the word "may" indicates that the granting of a decree for part-performance is discretionary with the Court.

Hindu Law—Suit by reversioner.

K. CHINA VARAYYA *v.* R. LAKSHMINARASAMMA, I. L. R. 37 Mad. 406.

A suit by a reversioner for a declaration that a deed of alienation or other instrument executed by a widow will not affect his reversionary rights abates on the death of the Plaintiff, and the cause of action does not survive to the next reversioner.

Reviews.

THE POLICE ACT. By *H. C. Sinha. Published by the Surma Office, Silchar. Price Rs. 2-8.*

This is the second edition of a book already known to the profession. In the present edition the notes have been revised and brought up to date. The book contains much useful matter, but the author might well have reduced the price to some extent. The printing is not faulty, but much better paper should have been used.

A MANUAL OF THE LAW OF TORTS. *By Prasanta K. Sen, M. A., LL. B. (Cantab.), Barrister-at-Law. Calcutta: S. K. Lahiri & Co., 56 College Street. 1915.*

This book of barely 250 pages presents a careful analysis of the law of torts, based evidently on a close study of the standard works on the subject and a first-hand acquaintance with the cases, the facts of which and the decisions arrived at are recorded at every step to illustrate the points enunciated. It is obviously intended not for practitioners but for students, to whom it can be recommended as a very reliable work. Within its small compass the principles of the law of torts have been very clearly, correctly and precisely stated. It is neither in its conception nor in its execution a cram-book. The author, who has been a teacher of law himself, has evidently made the best use of his experience, and neither students nor teachers of law will fail to profit by the study or consultation of this work.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before LORDS JUSTICES BUCKLEY, PHILLIMORE, and PICKFORD.

Wells v. *Great Western Railway Company.* 16th November 1914.

"Non-delivery," meaning of, in a contract of carriage by a railway company.

This was an appeal from the decision of a Divisional Court (Bray and Lush, JJ.). The Plaintiff, who was a butcher, claimed damages from the Railway Company for the non-delivery of some carcases of frozen meat. When the consignments arrived at their destination, the Plaintiff found that the number of carcases that were delivered was less than what had been sent. The contract of consignment was subject to the usual conditions printed on the back. One was that the Company should not be exempted from liability in the case of non-delivery, except where they proved that the non-delivery had not been caused by the negligence or misconduct of the Company, etc. The consignment was dispatched at owner's risk, and it was agreed that the Company should not be liable for loss, damage, mis-delivery, delay or detention, unless it was proved that the same arose from the wilful misconduct of the Company's servants.

The first Court held that it was a case of non-delivery, and allowed the Plaintiff's claim, and that judgment was affirmed on appeal. LORD JUSTICE BUCKLEY in dismissing the appeal said, that, on the true construction of these consignment-notes, there had been in the case of each consignment a non-delivery. Non-delivery of a consignment included non-delivery of part of the consignment. Non-delivery did not mean that the entirety must be the subject of non-delivery, but meant that there had not been delivery of the entirety.

Messrs. Schiller, K. C., and *Tathan* for the Appellants.

Messrs. Rawlinson, K. C., and *F. E. Weatherley for the Respondent.*

B. D. *Appeal dismissed.*

COURT OF APPEAL.—Before the MASTER OF THE ROLLS and LORDS JUSTICES SWINFEN EADY and PHILLIMORE. *Smith, Coney and Barrett v. Becker, Gray and Company.* 12th January 1915.

The effect of War and Embargo on the legality of a contract entered into before the War.

This was an appeal from a decision of Warrington, J. The Plaintiffs carried on business in Liverpool. In the beginning of 1914, the Plaintiffs had agreed to purchase sugar from the Defendants to be delivered at Hamburg in August 1914, at a stipulated price.

The German Government having placed an embargo on the export of sugar on the 31st July, the Plaintiffs on August 1st gave orders to the Defendants to sell the August sugar, which they had agreed to buy, at the best price. The Defendants thereupon entered into the contract to purchase the sugar from the Plaintiffs as sellers on that very date. The contract contained a war clause in the following words:—

"In the event of Germany being involved in a war with either England, France, Russia, and/or Austria, this contract, unless previously closed, shall on official notice being given that such a state of war exists be deemed to be closed at the average quotation of the official calls held on the sixth working day counted backwards from the day when such official notice is given."

The Plaintiffs now sought a declaration that the contract of August 1st 1914 was illegal by reason of the declaration of war on August 4th.

The Court below dismissed the claim, holding that the contract was valid and binding when it was made. The Court dismissed the appeal. The MASTER OF THE ROLLS observed:—

That he could see nothing illegal in the contract and nothing to justify the contention of illegality. The contract was for sale of sugar f.o.b. at Hamburg, or, if by reason of a war this was not possible, it was provided by the war clause that the contract should be settled by a payment of cash. There was no illegality in this contract with its two branches. If delivery was impossible, the contract could be performed by a payment in cash. That was the true construction of the contract, and there was nothing in the contention of illegality. Under the war clause there was a provision to meet the event of an outbreak of war.

With regard to the question as to the effect of the embargo, there was no authority to show that a mere embargo was a termination of the rights of the parties under their contracts; and there was nothing to show that the contract was entered into on the presumption that there would be no embargo. It was for the buyers to say whether the sugar was to be delivered in a ship at Hamburg or warehoused, and there was nothing to prevent them from saying that as there was an embargo the sugar must be warehoused. There was no ground, therefore, for saying that the contract was illegal or incapable of performance.

Messrs. Maurice Hill, K.C., and *Devonshire* for the Plaintiffs.

Messrs. Clauson, K.C., and *J. M. Gover* for the Defendants.

B. D. *Appeal dismissed with costs.*

produced in the shape of affectionate letters and post-cards written by them to the objectors and to their own mother, the authority of which cannot for one moment be doubted, though the witnesses of the Petitioner have had the audacity to deny all knowledge of them. It is clear from the correspondence that up till 1909, the sisters were on the most affectionate terms with their cousins, the objectors. One of the letters speaks of the objectors as the only hope of carrying on their father's name.

We therefore find two main facts against the Petitioner: *first*, that her petition is not *bonâ fide* but collusive and fraudulent, made solely as an answer to the suit for accounts against their mother and her agent, and, *secondly*, that no reasonable account is given of the circumstances which entitled the Petitioner to re-open the probate after so many years. The account she does give is entirely false, and as Shiva Sundari herself undoubtedly obtained the probate and they knew of it and acquiesced in it for many years, they must on the authorities give some good and true reason why they had not proceeded earlier. This doctrine is clearly laid down in *Hoffman* v. *White* (1) which was cited with approval in *Merryweather* v. *Turner* (2), where it was stated that the ground or principle upon which the Court proceeded in *Hoffman* v. *White* (1) was that the Petitioner was not barred by lapse of time, if he can show good reason why he did not proceed at an earlier period: but if he does not show good cause, the Probate Court will not allow him to call in the Will after such a lapse of time. The same view has been taken by this Court in *Kunja Lal Choudry* v. *Kailas Ch. Choudry* (3).

(1) 2 Phill. 230n (1805).
(2) 3 Curties 802 at p. 813 (1844).
(3) 14 C. W. N. 1068 (1910).

It is argued that in all these cases, there had been collateral litigation in other Courts to which the Petitioner had been a party and was thereby saddled with knowledge and acquiescence. But it does not seem to us to matter by what facts such knowledge and acquiescence are established, for neither knowledge, nor acquiescence, nor lapse of time are of themselves operative as a bar to the proceeding which every person interested in the estate of the testator had a right to bring, if they were not made parties in the probate-proceedings. What is held is that where knowledge, acquiescence and lapse of time are shown, the Petitioner must give some reasonable and true explanation of the delay, or in other words, the application must be made *bonâ fide*.

We are of opinion, apart from all authority, that our finding that this petition is a dishonest and vindictive proceeding supported by false evidence and not putting the true facts at all before the Court is certainly a bar to the re-opening of the probate obtained 30 years ago under circumstances which created no suspicion of a Will the provisions of which have been accepted by all the parties as reasonable and proper and such as the testator would be likely to make.

The appeal is therefore dismissed with costs. We assess the hearing fee at three gold mohurs.

Appeal dismissed.

PRIVY COUNCIL

[APPEAL FROM BENGAL.]

LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI
1914,
Heard, 27 and 28, October.
Judgment, 2, December.

HARI KISHEN BHAGAT and ors., Appellants,
v.
KASHI PERSHAD SINGH (since deceased) and ors., Respondents.

Hindu Law—Widow, alienation by—Attestation of deed by reversioner, if necessarily imports consent—Consent when supplies proof o legal necess ty—Sufficient consent, what is—Consent of what kindred necessary—Onus

To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her, can be supported only by proof aliunde *that such debt was contracted for valid and legal necessity, and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates.*

The requirement of the law may, however, be fulfilled by proving the consent or concurrence of the reversioners to or in the transaction.

The consent of the reversioners must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests. Such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony.

Attestation by a relative does not necessarily import concurrence.

When consent of the husband's kindred is relied upon for the validity of alienations effected by the widow, the kindred in such case must generally mean all those who are likely to be interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law.

RAJ LUKHEE DEBIA *v.* GOKOOL CHUNDER CHOWDHRY (2), *applied.*

These were consolidated appeals from a judgment of the Calcutta High Court, dated the 11th March 1909, affirming the judgment and decree of the Subordinate Judge of Monghyr. The facts of the case sufficiently appear from their Lordships' judgment. The main questions raised in the suits were—(1) whether certain mortgages made by a Hindu widow affected the whole estate or only the widow's estate; (2) whether the mortgages, if of the whole estate, were made for such a legal necessity as would bind the reversioners; and (3) what was the effect of the attestation of the mortgage by the sole reversionary heir on the Plaintiff's claim. The Court of first instance found against the Defendants on all the three points. On the third question it recorded its judgment as follows:—

"In *Raj Lukhee* v. *Gokool Chunder* (2), I find the following observation. 'If people were to be held bound by any instrument which they subscribe, it might be a dangerous thing to witness any other man's signature.' Therefore the mere fact that these documents appear to have been attested by some reversionary heirs, will not be sufficient to conclude them from asserting their title to the property. My attention was drawn to *Gopaul Chunder* v. *Gour Monee* (3), *Mutadeen Roy* v. *Mussoodun Singh* (4), *Madhub Chunder* v. *Gobind Chunder* (5), *Raj Lukhee* v. *Gokool Chunder* (2), *Trilochun* v. *Umesh Chunder* (6), *Rajbullubh* v. *Oomesh Chunder* (7), *Nobo Kishore* v. *Hari Nath* (8), also to sec. 640, Mayne's Hindu Law. I have

(2) 3 B L. R. (P. C.) 57: s. c. 12 M. I. A. 209 at p. 228; 12 W. R. 47 (1869).
(3) 6 W. R. 52 (1866).
(4) 10 W. R. 393 (1868).
(5) 9 W. R. 350 (1868).
(6) 7 C. L. R. 571 (1880)
(7) I. L. R. 5 Cal. 44 (1878).
(8) I. L. R. 10 Cal. 1102 (1884).

HARI KISHEN BHAGAT v. KASHI PERSHAD SINGH.

read the rulings and the section referred to, and to my thinking they do not apply to the present case. I think I have said that the attestations are not those of all the reversioners proved to be living at the time of the execution of each document. There is a good deal of difference between a mortgage and a conveyance. A Hindu widow is competent to make a mortgage of her husband's estate for legal necessities. She is also competent to mortgage her life-interest in the estate. I have already said that the mortgages were of the life-interest of the Musammat, and if attestation of a document means consent to the terms of such document then the attestations of the reversioners simply mean that they consented to the mortgage of the Musammat's life interest and nothing more. Will such attestations conclude them from contesting the validity of a transfer of the absolute interest to the estate of the Musammat's husband, to which transfer they never consented? I may also observe that in the mortgage-suits, the Plaintiffs were not made parties. If the absolute interest was intended to be bound by the mortgage, the Plaintiffs should have been arrayed in those suits as Defendants. The cases cited above were about the transfer by conveyance of the absolute and entire interest of a widow's husband's estate. But the cases under consideration relate to mortgage piecemeal of a widow's husband's estate. The principle enunciated in *Radha Shyam* v. *Joy Ram* (9) will apply to this case. See also *Jiwan Sing* v. *Misri Lall* (1), *Nurul Husain* v. *Sheo Sahai* (10). It is impossible to say that when the Plaintiffs attested the documents, they did so with full knowledge that the effect of such attestations would be to deprive them from claiming the estate of Shyamal Singh after the death of the Musammat, and with an intelligent intention to consent to such effect."

On appeal the High Court affirmed the decree and the findings of the first Court. In the course of his judgment, Lal Mohun Doss, J. (Richardson, J., concurring) observed as follows :—

"It was said by the learned Vakil for the Appellant that though there be no proof that the consideration for the first mortgage was advanced to meet purposes recognized as legally necessary, the document was witnessed by Raghubir who, at the date of that document, was according to the finding of the Court below (a finding which has not been questioned in appeal) the sole reversionary heir, and also by Behari Singh, the son of Bhupal, and further that the document was signed on behalf of the lady by, and the consideration of the bond was received through, the Plaintiff. On these facts it was contended that Raghubir consented to the transaction, and that his consent had the effect of transmuting what could otherwise have been a mortgage of the limited estate only into a mortgage of the whole inheritance. In further support of this position, stress was laid upon the words 'I, my heirs and successors are, and shall be, in every respect, bound by this writing,' which words occur in the bond. I am unable to accept this contention as sound. We have not been referred to any direct authority in support of this contention. Assuming that attestation of the document by Raghubir may be taken as proving that he consented to the transaction, it seems to me that consent by itself is not sufficient to establish the existence of legal necessity [*Bepin Behari Kundu* v. *Durga Charan Banerji* (11)], and in so far as it may be treated as corroboration of the evidence of the existence of such necessity, it can be of no avail here, for, as I have indicated, there is no other evidence on the subject to which any probative force can be attributed. Thirdly, in further regard to the contention that the mere consent of the reversioner, assuming that he consented, was sufficient, apart from any question of legal necessity, to validate the transaction as against the estate, reference may be made to the case of *Sham Sunder Lal* v. *Achhan Kunwar* (12), where a widow holding a widow's estate in her husband's property, had, in 1877, executed jointly with Achhan

(1) L. R. 23 I. A. 1 : s. c. I. L. R. 18 All. 146 (1895).
(9) I. L. R. 17 Cal. 896 (1890).
(10) I. L. R. 20 Cal. 1 (1892).
(11) I. L. R. 35 Cal. 1086 (1908).
(12) L. R. 25 I. A. 183 : s. c. 2 C. W. N. 729 (1898).

HARI KISHEN BHAGAT *v.* KASHI PERSHAD SINGH.

Kunwar, her daughter, and Enayet Singh, the minor son of that daughter, a mortgage-bond in favour of a creditor, without legal necessity. The mortgage-bond was signed by the husband of Achhan Kunwar under a power-of-attorney executed in his favour by the widow and her daughter. A similar mortgage-bond had been executed, in 1881, by Achhan Kunwar and her son Enayet who had then become of age. With reference to these two deeds, their Lordships of the Privy Council observed as follows:—'In 1877, neither Achhan Kunwar nor Enayet Singh (even if he had been of age) could, by Hindu Law, make a disposition of, or bind, their expectant interests, nor does the deed apply to any but rights in possession; and, in 1881, Enayet Singh was equally incompetent to do so, though the deed purports to bind future interest. To give validity to the bonds as against the estate of Khairat Lal, the Plaintiffs and Appellants must show that there was legal necessity for raising the money by a charge on Khairat's estate, or, at least, that in advancing their money the creditors gave credit on reasonable grounds to representations that the money was wanted for such necessity.' This decision clearly shows that where a Hindu widow borrows money on mortgage of her husband's estate, though the transaction may be concurred in, or consented to, by the next reversioner, such consent or concurrence cannot have the effect of conferring on the deed a larger operation than a mortgage of the limited interest only.

"I think that the doctrine of surrender, upon which the validity of a sale out and out of the whole or any portion of the inheritance with the consent of all the immediate reversioners is based [*Bajrangi Singh* v. *Mano Karnika Buksh Singh* (13)], cannot legitimately be extended to the case of a mortgage where *ex hypothesi* the widow still retains the ownership of the estate though subject to the liability created by the mortgage, nor can the validity of the first mortgage-bond be rested on the doctrine of estoppel, for there was no representation whatever on the face of the bond, and there is no reliable evidence of any representation *aliunde* that the money was required for any justifiable purpose so as to bind the absolute estate."*

Hence this appeal.

Mr. A. M. Dunne for the Appellants submitted that the mortgages had been entered into with the approval and consent of the reversionary heirs, which was sufficient to prove such a legal and valid necessity for the said transactions as to be binding upon the Plaintiffs. The sole reversionary heir attested the document, and although mere attestation was not quite sufficient, the evidence established that the reversioners clearly consented to the transactions. (The learned Counsel discussed the evidence on the question of consent.) The reversioner's consent raised a presumption in favour of the Appellants, namely, that the widow's alienations were proper and that they were made for legal necessity. The Plaintiffs produced no evidence to rebut that presumption, and therefore their claims must fail. Reference was made to the following:— *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (14), *Raj Lukhee Debia* v. *Gokool Chunder Chowdhry* (2) and *Bajrangi Singh* v. *Mano Karnika Buksh Singh* (13).

Mr. G. R. Lowndes for the Respondents submitted that there was no evidence on the record of intelligent consent to the transactions by the next reversioner, Raghubir, and that the findings of the Courts below were against the Appellants. As to the nature of the consent which the Plaintiffs must show in such cases, reference was made to *Raj Lukhee Debia* v. *Gokool Chunder Chowdhry* (2) and *Jiwan Sing* v.

(13) L. R. 35 I. A. 1: s. c. 12 C. W. N. 74; I. L. R. 30 All. 1 (1909).

* For a full report of this judgment, *see* 13 C. W. N. 644 (1909).

(2) 3 B. L. R. (P. C.) 57: s. c. 13 M. I. A. 209 at p. 228; 12 W. R. 47 (1869).

(13) L R. 35 I. A. 1: s. c. 12 C. W. N. 74; I L. R. 30 All. 1 (1909).

(14) 8 M. I. A. 550 (1861).

Misri Lall (1), *Sham Sunder Lal* v. *Achhan Kunwar* (12).

Even admitting, that the reversioner's consent raised a presumption in the Appellants' favour, it was a rebuttable presumption, and the Plaintiffs had rebutted it by proving that there was in fact no legal necessity for the transactions.

Their Lordships intimated to the learned Counsel that they did not wish to hear him any further, and *Mr. Dunne* then replied.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The question for determination in these appeals relates to the validity, as against the reversioners, of certain sales held in execution of decrees obtained on mortgages effected by a Hindu widow, who had succeeded to her husband's estate on his death without leaving any issue. Shyamal Singh, the husband, died in 1842, and the widow, Dulhin Nawab Kumari held the properties which form the subject of the present litigation until the transactions the validity of which is challenged in these suits.

The first mortgage was executed by Nawab Kumari in favour of the Defendant, Appellant, on the 26th of November 1877 in respect of three of the properties in her possession. On the 11th of July 1882 she mortgaged the rest of the properties to Bhagat for a further loan, and in 1889 she gave him what is usually called in India a *ticca pottah* of the shares of Shyamal Singh in all the mauzas save one. Under this usufructuary lease the Defendant obtained possession of the shares covered by it.

In 1893 Bhagat brought a suit against Nawab Kumari on the mortgage of 1877 and in execution of the decree on that bond purchased the three properties to which it related. In 1897 he obtained a decree on the bond of 1882, in execution of which he himself purchased again the remaining properties held by the widow. He thus obtained possession of all the shares in the different villages which Nawab Kumari had inherited from her husband for a widow's estate.

Nawab Kumari died in 1900, and the Plaintiffs, who are Shyamal Singh's brothers' sons, and whose reversionary right to his estate, though questioned in the first Court, is not disputed now, brought the present suits to recover possession of the properties held by Bhagat under the execution-sales of 1893 and 1897, their main contention being that neither the mortgages executed by Nawab Kumari nor the sales thereunder affected more than her interest which ceased on her death.

Hari Kishen Bhagat is the principal Defendant, but his sons have been impleaded in both actions, as they are joint in estate and living in commensality with him, and are, therefore, necessary parties.

The main defence to the Plaintiffs' claims was that the mortgages were effected by the widow for valid and legal necessity under the Hindu Law, and, further, that they were concurred in by the reversioners, and that consequently the Defendants by virtue of the sales in question acquired the interests of the widow as well as theirs. It is to be remarked that in neither of the mortgage-suits were the reversioners made parties.

At the time when the bond of 1877 was executed, the nearest reversioner to Shyamal Singh was his sole surviving brother, Raghubir Singh. After him stood Raghubir's sons, of whom there were

(1) L. R 23 I. A. 1 : s. c. I. L. R. 18 All. 146 (1895).

(12) L. R. 25 I. A. 183 ; s. c. 2 C. W. N 729 (1898).

several, and the sons of two other brothers, Bhupal and Jagrup, who were dead at the time. Among these nephews of Shyamal Singh the names of Behari, the only son of Bhupal, and of Bajrung Sahai, a son of Jagrup and a Plaintiff in one of the present actions, should be particularly mentioned, as they figure in the transactions in question.

In the instrument of 1877 the name of the widow is written by Bajrung Sahai Singh. He also appears to have purchased the stamp paper on which the bond is inscribed. Among the witnesses to the document are Raghubir and Behari.

The name of the widow in the mortgage of 1882 appears to be written by Behari Singh, and one of the witnesses to this bond is Bajrung Sahai. On the lease of 1889 Nawab Kumari's name is written by Modenarain, a son of Raghubir, and the witnesses are Ram Parshad, another son of Raghubir, Bishan Parshad, one of the sons of Behari, and Bajrung Sahai who also appears to have identified the lady to the Registrar. Both the Courts in India have found that so far as the *ticca pottah* of 1889 is concerned, the debt contracted thereunder has been satisfied out of the usufruct of the properties covered by the lease.

The points for determination in these appeals depend on the transactions of 1877 and 1882 respectively. The law relating to the dealings of a Hindu widow with her husband's estate which devolves on her in default of issue is now too well settled to need a prolonged consideration. To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or such alienation was made for valid and legal necessity, and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. The requirement of the law may, however, be fulfilled by proving the consent or concurrence of the reversioners to or in the transactions.

In the present cases the Trial Judge in a careful and well-considered judgment held that the Defendants had failed to prove any valid and legal necessity for the mortgages executed by the widow. This view has been affirmed on appeal by the High Court of Calcutta, and there being thus a concurrent finding of fact by the two Courts in India, that subject is now out of the region of discussion. Both the Courts have further held in effect that the part taken by the reversioners with respect to the transactions in question did not amount to a consent to bind their interests. In view of the facts and circumstances of the case, their Lordships have no hesitation in expressing their concurrence with the conclusion at which the Courts in India have arrived. The Trial Judge has carefully examined the phraseology of the two instruments, and he is of opinion that their language is fully consistent with the fact that the interest of the widow alone was intended to be charged. Nor is there anything to show that the reversioners who helped her to raise the loans understood it otherwise. There is no evidence that they benefited from the transactions, or that so far as they were concerned there was any need for the mortgages. Their Lordships think that when a "stringent equity," to use Lord Hobhouse's expression in the course of the argument in *Jiwan Sing* v. *Misri Lall.* (1), arising out of an alleged con-

(1) L. R. 23 I. A. 1 : s. c. I. L. R. 18 All. 146 (1895).

sent by the reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony such as appears to have been relied upon in this case.

In *Raj Lukhee Debia* v. *Gokool Chunder Chowdhry* (2), this Board refused to affirm the proposition that mere attestation by a relative necessarily imports concurrence, and they added that when the consent of the husband's kindred is relied upon for the validity of alienations effected by the widow "the kindered in such case must generally mean all those who are likely to be interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law." The observations of the Board in that case seem to their Lordships to apply with particular force to the facts of the present case.

On the whole, their Lordships are of opinion that the judgments appealed from are right and ought to be affirmed, and that these appeals ought to be dismissed with costs. And they will humbly advise His Majesty accordingiy.

Solicitors: *Messrs. T. L. Wilson & Co.*, for the Appellants.

Solicitors: *Messrs. Theodore, Bell & Co.*, for the Respondents.

B. D. *Appeal dismissed with costs.*

(2) 3 B L. R. (P. C.) 57: s. c. 13 M. I. A. 209 at p. 228; 12 W. R. 47 (1869.

CIVIL APPELLATE JURISDICTION.

APPEALS FROM ORIGINAL DECREES NOS. 219 AND 241 OF 1910.

STEPHEN, J.
MULLICK, J.
1914,
Heard, 26, 27 & 28, May and 2, June.
Judgment, 16, June.

THE NOWAGHUR COAL CO., LD., Defendants, Appellants,
v.
SASHI BHUSAN RAY, Plaintiff, Respondent.

Mining rights—Brahmottar *grant of entire mauza be ore Permanent Settlement, effect o', in relation to mining rights*

The effect of a grant of a rent-free brahmottar of the whole of a mauza made before or after the Permanent Settlement is not to transfer any mining rights.

JYOTI PRASAD SINGH v. LACHIPUR COAL CO. (5) *and* KUNJA BEHARY SEAL v. RAJA DURGA PROSAD SINGH (6), *relied on.*

HARI NARAIN SINGH DEO v. SRIRAM CHAKRAVARTI (1), *followed.*

These were appeals preferred on the 11th June 1910 against a decree of Babu Advaita Proshad Dey, Subordinate Judge of Zilla Manbhum, dated the 28th February 1910.

The facts of the case will appear from the judgment.

No. 219 of 1910.

Dr. Rash Behary Ghose (with him *Babus Lalit Mohan Ghose* and *Karunamoy Ghose*) for the Appellant—My grounds are (1) There is no evidence of a permanent *lakheraj brahmottar* grant made in favour of the ancestor of Plaintiff's lessors.

(1) L. R. 37 I A. 136: s. c. I. L. R. 37 Cal. 723; 14 C. W N. 746 (1910).

(5) 16 C. W. N. 241: s. c I. L. R. 38 Cal. 845 (1911).

(6) Reg. App. No. 197 of 1911, since reported, 19 C. W. N. 203 (1914).

(2) Even if there was any grant it comprised the cultivated lands and not the *danga* lands.

(3) That even if there was a grant made before 1st December 1793, as they allege, it did not and could not convey to the grantees the sub-soil rights in Gobindpur.

(4) My client having been in adverse possession of the mines for more than 12 years the suit is barred by limitation.

(5) Plaintiff's suit must fail as there was a prior lease in favour of Dr. Saise which has not been surrendered by the lessee, but was actually subsisting at the time of the present suit.

The zamindar had no right to the minerals before 1st December 1793. Refers to Manu's Institute, Chap. VIII, Sloka 39. During the Permanent Settlement, minerals were not taken into consideration in fixing the assessment of revenue. Refers to Philip's Tagore Law Lectures, pp. 47, 217, 222, 319—322.

Refers to *Golab Chand* v. *Janki Koer* (7).

In the year 1771, Mr. Warren Hastings as Governor-General of India settled all the mines in Bengal with a company for a period of 18 years.

See "Bengal District Gazetteer", Vol. 28, p. 170.

That shows that the minerals belonged to the sovereign. It was in the year 1880 that the Secretary of State for India in Council gave up the rights of the Government to the mines in favour of the zamindars. The *lakheraj brahmottardars* being volunteers could not claim title to minerals under the law laid down in sec. 43 of the Transfer of Property Act. So the zamindar could not convey the minerals before 1793 and the *brahmottardars* did not get it.

The grant of the entire village if any was only a grant of the surface. The onus is on the grantee of the *brahmottar* right to prove that he got the minerals also.

See *Hari Narain Singh Deo* v. *Sriram Chakravarti* (1), *Durga Prasad Singh* v. *Braja Nath Bose* (2), *Jyoti Prasad Singh* v. *Lachipur Coal Co.* (5), *Abhiram Goswami* v. *Shama Charan Nandi* (8) and *Tituram Mukerji* v. *Cohen* (9).

The fact that there was no rent shows that only the cultivated lands were granted. The Judicial Committee of the Privy Council inferred so from the lowness of the *jama* in the *Petana* case.

Refers to the unreported judgment of Fletcher and Richardson, JJ., in *Kunja Behary Seal* v. *Raja Durga Prosad Singh* (6).

Refers to sec. 108, cl. (*o*), of the Transfer of Property Act.

Mr. S. P. Sinha, *Babus Bepin Behary Ghosh*, *Satish Chandra Mookerjee* and *Hem Chandra Mukherji* for the Respondents.

No. 211 of 1910.

Mr. Graham (with him *Babus Manmatha Nath Mukherjee* and *Kunja Behary Sen*) for the Appellants—Adopts the arguments of Dr. Ghose.

Mr. S. P. Sinha (with him *Babus Bepin Behary Ghose*, *Satish Chandra Mookerjee* and *Hem Chandra Mukherji*) for the Respondents.—The lease to Dr. Saise was never acted upon. It was a paper tran-

(1) L. R. 37 I. A. 136: s. c. I. L. R. 37 Cal. 723; 14 C. W. N. 746 (1910).

(2) 16 C. W. N. 482: s. c. I. L. R. 39 Cal. 696 (1912).

(5) 16 C. W. N. 241: s. c. I. L. R. 38 Cal. 845 (1911).

(6) Reg. App. No. 197 of 1911, since reported 19 C. W. N. 203 (1914).

(7) 17 C. W. N. 1195: s. c. I. L. R. 41 Cal. 286 at p. 293 (1913).

(8) 14 C. W. N. 1: s. c. I. L. R. 36 Cal. 1003 (P. C.) (1909).

(9) 9 C. W. N. 1073: s. c. I. L. R. 33 Cal. 203 (P. C.) (1905).

saction. Dr. Ghose admits it to be so. So no question of subsisting title arises.

Then there is no question of limitation.

[Stephen, J.—You need not labour upon that point.]

Mr. Sinha.—I am entitled to the minerals, being owner of the surface. Land and the mines under it do not form separate hereditaments. If I have land, can I not dig under it? If there is any severance of land-surface and sub-soil, then the question of intention comes in.

There cannot be and has not been a question whether a conveyance of land passes all interest the transferor has.

Reads Bainbridge, Chap. 2, sec. 2, p. 38, *Rowbotham* v. *Wilson* (10).

It is not a question of legislation, but *ex jure naturæ*. It is the law in England and in India. If you sell land, you sell also the earth under it. The proposition that the English law is different and was made different by the Conveyancing Act is a startling proposition. The Conveyancing Act does not mention mines and minerals. The words are the same as in the Transfer of Property Act.

Reads sec. 6, cl. (3), of the Conveyancing Act.

Reads sec. 108, cl. (*o*). That section itself shows that rights to minerals pass. The lease is therefore not a lease of the surface but a lease of the mines. He is authorized to work open mines. If the lease did not convey minerals, how is the lessee entitled to work open mines?

That shows that transfer of land is always transfer of sub-soil.

I am clear of those Privy Council decisions, because I am not a lessee; I am a *lakheraj brahmottardar*. Therefore the transfer of the property to me absolutely was a transfer of the whole interest, mines and minerals including. My next point is that, I am a grantee of a *lakheraj brahmottar*—of an absolute transfer.

A grant of *brahmottar* can never be taken back. It would be a startling idea to a Hindu sovereign. Refers to the definition of *brahmottar* in Wilson's Glossary. It means "lands granted rent-free to a Brahmin for their support and to their descendants." The very name of it implies permanency. It is a permanent tenure and heritable. It was granted in the year 1192. The Subordinate Judge has found the *patta* to be forged. I do not rely on it. The facts are—it is a grant more than 125 years old; it has descended from generation to generation and those people who held did not pay any rent for it. The only possible conclusion from these facts is that it is a permanent grant. All these facts prove that it is an absolute permanent grant.

Refers to Dr. Gour's Transfer of Property Act, Vol. III, pp. 1370, 1376 and 1379. If my interest is an absolute interest, what is left in the lessor? If there are no heirs, then the tenure will escheat to the Government. These lands are free from revenue. The Chakravartis do not contribute for payment of revenue. It is not necessary for me to refer to Hindu and Mahomedan Laws. Zamindars and talukdars were declared to be proprietors of the soil by the Permanent Settlement Regulations. By Decennial Settlement public demand was fixed upon the land. The British Government recognised the proprietary right of the zamindars from the beginning. The controversy was settled in 1880.

From before the Permanent Settlement, zamindars were proprietors of the land. If in 1190 Raja Digbijoy Singh had any right to the surface, he had also right to sell his right to the minerals.

(10) 8 H. L. C. 348 at p. 360 (1860).

Refers to *Megh Lal Pandey* v. *Raj Kumar Thakur* (4).

Babu Bepin Behary Ghose.—Sriram Chakravarti's case (1) does not touch the question. The question here was whether by a lease of agricultural character minerals pass. The case of *Durga Prasad Singh* v. *Braja Nath Bose* (2) is quite distinguishable. It was a service tenure. In the case of *Jyoti Prasad Singh* v. *Lachipur Coal Co.* (5), the relationship was that of a landlord and tenant. Refers to *Quinn* v. *Leathem* (11). Each case is an authority for what it decides.

Dr. Ghose in reply.—Mr. Sinha has not touched the real question in the case. The zamindar could not convey any right to minerals prior to 1793, and the *lakherajdar* being a transferee without consideration cannot claim title under sec. 43, Transfer of Property Act. I strongly rely on that. A *lakherajdar* is also a tenant.

Reads *Gokhul Sahu* v. *Jadu Nundun Roy* (12).

In *Durga Prasad Singh* v. *Braja Nath Bose* (2), Lord Macnaghten has said what was held by their Lordships in *Sriram's* case (1).

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff brought this suit to have the *maurasi* rent-free *brahmottar* title of his lessors, Defendants Nos. 3 to 18, to the Mauza Gobindpur established; and to have it declared that he has a right to mines in the mauza, and that the first Defendant has no such right. His case is that at some time before the Permanent Settlement the mauza in question was in the zamindary of Raja Jaga Mohun Singh, the ancestor of Defendant No. 2, who granted it as *brahmottar* to the ancestor of the Chakravarti Defendants (Nos. 3 to 18) by a *pottah*, dated the 26th May 1784, and on that being lost, by a second *pottah*, dated the 10th December 1790. On the 14th of June and the 1st December 1907, the Plaintiffs took a settlement of the under-ground rights of the whole mauza from the Chakravartis, and commenced to exercise them by sinking a pit. In the following March the principal Defendants opposed their doing so, and proceedings under sec. 145, Cr. P. C., were instituted which led to the Defendants being declared to be in possession. Hence this action.

The Defendants generally deny the Plaintiff's title, and set up one of their own. This is that on the 25th January 1893, the second Defendant made a settlement of the mining rights in the mauza to one Purna Chandra Dawn, who assigned them to the Katras-Jherriah Company, who abandoned them in 1896. From that time till 1899, the Court of Wards, who had taken over the estate of Defendant No. 2, tried to secure a lessee of the mineral rights, and eventually settled them with the first Defendants on the 3rd October 1899, who say that they have since then been in possession. They also plead that the Plaintiff is barred by limitation as they say that he was not in possession of the mines or minerals for more than twelve years before suit. The Defendants raised a further point during the hearing that the Plaintiff's lease of 1907 conveys nothing to him, as the Chakravartis had let the same property to Dr. Saise in 1896, and that lease was still outstanding.

(1) L. R. 37 I. A. 136 : s. c. I. L. R. 37 Cal. 723 ; 14 C. W. N. 746 (1910).
(2) 16 C. W. N. 482 : s. c. I. L. R. 39 Cal. 696 (1912).
(4) 11 C. W. N. 527 : s. c. I. L. R. 34 Cal. 358 (1906).
(5) 16 C. W. N. 241 : s. c. I. L. R. 38 Cal. 845 (1911).
(11) [1901] A. C. 495 at p. 506.
(12) I. L. R. 17 Cal. 721 at p. 725 (1890).

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The suit was decreed by the Subordinate Judge of Manbhum, and both the Defendants have appealed against his decree. They have appealed separately; but the two appeals have been heard together, and we need not distinguish between them.

The points raised before us by the Appellants are as follows :—

(1) There is no evidence of a permanent *lakheraj brahmottar* grant made in favour of the Plaintiff's ancestor;

(2) If there was any such grant it comprised only cultivated, and not waste, or *danga* land;

(3) Such a grant whether made before or after the date of the Permanent Settlement could not pass any mining rights;

(4) The suit is barred by limitation as the Defendant and his lessees had been in possession of the mines in the land for more than 12 years;

(5) The suit must fail because there was a lease to Saise prior to that of the Plaintiff, which was actually subsisting at the time of the institution of the suit.

The evidence of a permanent *lakheraj brahmottar* grant in favour of the Plaintiff's ancestors rests in the first place on the *patta* put forward by the Plaintiff. This is dated the 27th Aughran 1197 = the 10th December 1790, and contains a gift from the ancestor of Defendant No. 2 to Lakshan Chakravarti of Mauza Gobindpur as *brahmottar*. It also recites that the grantor had granted a *pottah* to Bhagwat Chakravarti on the 15th Jeyt 1192 = the 26th May 1784, but that as it was lost, he granted a second *pottah*. The lower Court has disbelieved the authenticity of this document, and we are not prepared to accept it as authentic. The reasons for accepting it are that it is produced from proper custody; reference was made to it in the settlement proceedings in 1871, in registration proceedings in 1877, and in the proceedings under sec. 145, Cr. P. Code, in 1908; that we have mentioned. The reasons for disbelieving it given by the lower Court are that the writing and paper do not appear to be so old as they purport to be, that it was not produced either in the proceedings under sec. 145 or when this suit was brought. The Plaintiff denied having seen it in his deposition in this suit, though he said the contrary in the criminal proceedings; the Judge disbelieves the evidence of Shashi Bhusan Chakravarti who speaks to its custody and eventual discovery for reasons with which we agree, and he gives good reasons for doubting the indorsements on the back of the document purporting to show that it was produced in the proceedings in 1871 and 1877. The Defendant is not concerned to deny that there may have been a grant in 1784; but he suggests that as the terms of that grant were not such as would support the case now made by the Plaintiff, he has forged Ex. 2 to take the place of the grant alleged to have been lost. For ourselves we can only say that the grant of 1790 has not been sufficiently well proved for us to be able to treat it as authentic.

The question then arises whether the Plaintiff can make out a title in the Chakravartis, his grantors, apart from the discredited *patta*, and again we agree with the Judge who finds that the Chakravartis held the mauza under a rent-free *brahmottar* grant, and not as a service tenure. We see no reason, however, for holding that the grant was made either before or after the Permanent Settlement. The evidence afforded by the *mulki* papers of 1843 (Ex. 1) where the Raja returns Bhagwat Chakravarti as holding under a *brahmottar pottah* of 1784, the

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jamabandi of 1854 (Ex. B2) where the manager of the Court of Wards shows Gobindpur as rent-free, the return of 1861 (Exs. 14, 13) where the Raja describes Gobindpur as *brahmottar*, the claim by the Chakravartis in 1871 (Ex. 5) to hold the mauza in rent-free *brahmottar* with its recognition by Mr. Rowlett (Exs. 5 and 12), the admission in the Road-cess return of 1872 (Ex. 19) that Gobindpur was *brahmottar*, even though it was made by a manager on behalf of the minor, largely outweigh any inference that can be drawn from the receipts (Exs. B 30 to B 39) in which the Chakravartis are described as "Jimmas," while the application for the registration of the mauza as rent-free *brahmottar* and its rejection (Ex. 7) do not, at least, tell against the Defendants' contention, since it is not attempted to show that the land is free from payment of revenue, which it would have been for the application to have succeeded.

This brings us to the second point in the Appellant's case, which is that the lands granted to the ancestors of the Plaintiff's grantors were only the cultivated lands in the mauza, and did not include the waste lands.

From Ex. B 70 [the General (Tauzi) Register of revenue-paying lands in Manbhum], it appears that the area of Gobindpur, as it is now known, is 76 acres, which is about 220 bighas. Was the whole of this granted, in whatever manner, to the Chakravartis? The answer to this question depends in part on documents that we have already considered. Thus in the *mulki* papers of 1843 the area of the land referred to is stated to be approximately 54 bighas. The "Remarks Column" is provided to show how many bighas of the said mauza are [wa]ds, how many bighas cultivated, whether inhabited or without habitation;" and it does show that "in this mauza there are 24 bighas of cultivated land, 30 bighas of *danga* land not inhabited." It also gives boundaries which, on the evidence of both parties, in the opinion of the lower Court, are the boundaries of the entire mauza, and the correctness of this finding has not been disputed before us.

In 1861 the *thakbust* map was being prepared. The Raja made a return (Ex. 13) "that the mauza is *brahmottar*," saying nothing of any distinction between the waste and the cultivated land. A deposition by Ram Kanai Chakravarti (Ex. 17) seems to show that measurement was made of the *asli* mauza and no other *tola* was included, and that the entire mauza was given to Bhagwat Chakravarti, the grantee in 1784. In settling the *thakbust* boundaries it seems (Ex. 18) that the matter was left entirely to the Chakravartis, and that the Raja contented himself with making the return (Ex. 13), which we have already referred to. The *thakbust* map itself (Ex. 16) indicates the extent of the mauza as only 9 bighas 10 cottahs, and the boundaries do not seem to have any relation to those given in the *mulki* papers. This does not fit in with the case made by either party, and leads to the conclusion that the map is not to be relied on and measurement of the whole mauza was made by Ram Krishna Mistri (Ex. 12) in 1871, when he found that it contained 59 bighas in all. We agree, however, with the Subordinate Judge that, for the reasons he has given, there may have been waste lands outside the mauza. The Road-cess return of 1872 (Ex. 19) made by the *tahsildar* of the Court of Wards in 1872 (Ex. 19), and subsequent returns made by the Chakravartis, are all made without any reference to the existence of waste lands, which

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if the law contained in Act IX of 1880 (B. C.) had been complied with would have been an indication that no waste lands existed in the mauza. We find it difficult, however, to attach much weight to this argument in face of the reasons for not doing so advanced by the Subordinate Judge and the evidence to which he refers.

In the proceedings in 1871, when the Chakravartis applied to have their *brahmottar* released from rent, it does not appear that either they or Mr. Rowlett, the manager for the Court of Wards, recognised the mauza as containing more than the 59 bighas mentioned in the measurement papers of that year. In the application for registration made by the Chakravartis in 1877 (Ex. 7) we find that it is stated that the area of lands, which include Gobindpur, has not been found out by measurement; but that a measurement by *murris*, that is, by a unit of cultivated land, is given—a fact which supports the view taken by the Judge of the Road-cess papers.

In 1904, we have a curious petition from Akshoy Kumar Chakravarti (Ex. B) in which he complains that the Katras-Jherriah Coal Co. called, the Bird Coal Co. is "unjustly possessing the surface lands of Gobindpur and another mauza under a right derived from the Raja's estate"; as a result of which an order was made (Ex. B 26) by the Court of Wards disallowing the claim made to the waste lands of Gobindpur. The order itself was based on the Road-cess returns, and is of no importance; but as the Katras-Jherriah Co. were in possession of the land merely for mining purposes, the limitation of the complaint in the petition to surface rights is certainly curious.

In the land acquisition proceedings in 1905, there seems to be no doubt that the manager for the Raja received all the compensation for waste land that was acquired; while the Chakravartis obtained compensation only as cultivators. The Raja's rights to the waste land seems thus to have passed uncontested—a conclusion highly adverse to the full claim made by the Plaintiff. The Judge however points out that the acquisition proceedings were based on a mistake, as the Chakravartis were supposed to have a *kheraji* and not as they in fact had a *lakheraj brahmottar*, that the Chakravartis may not have known that the *danga* lands were being ascribed to the Raja, and that the amounts in question were not large enough to make litigations profitable. This conclusion depends in part on the evidence of Shashi Bhusan Chakravarti, whom elsewhere the Judge has not been inclined to trust and in view of the fact that he was a party to the proceedings and in fact received compensation under them it is difficult to believe that he did not know that it was also paid to the Raja as he swears it was not.

This concludes all the evidence on which we must decide this part of the case; and we feel that any decision we come to must be open to considerable doubt; and necessarily so, because it is probable that for many years both the Chakravartis and the Raja regarded the lands as of no value, and both sides may well have exercised rights over them without attracting the notice of the other On the whole, however, we feel disposed to attach more importance to the earlier than to the later documents before us: and while we regard the *mulki* papers as ambiguous as to the point before us, we attach a good deal of importance to the Raja's return of 1861, and to the fact that the Raja did not care to take any part in settling the *thak* map, which he probably would have

done, had the mauza been divided between the Chakravartis and himself. On the other hand, we should not like to depend much on the Road-cess papers, and though the land acquisition proceedings have to be carefully considered, we cannot consider that they outweigh the conclusion we draw from the earlier proceedings. Under these circumstances we hold, though with considerable doubt, that the waste lands were included in the *brahmottar* granted to the Chakravartis.

We have next to deal with the most important point in the case, which, on the findings that we have come to is as follows: Did a grant of a rent-free *brahmottar* of the whole of a mauza made before the Permanent Settlement pass any mining rights? From this point of view we consider that the case is covered by the decision in *Hari Narain Singh Deo* v. *Sriram Chakravarti* (1). In that case the Subordinate Judge and the High Court both held that the Defendants had a permanent tenure at a fixed rental in the Plaintiff's zamindary; there was nothing to show how the tenure originated, or that anything had or had not been settled about mineral rights at that time. The first Court held that the minerals did not pass to the grantee, party, it appears, because of the low rent that was reserved. This Court set aside that finding holding that the zamindar had divested himself of everything except the nominal proprietorship and turned his right practically into a perpetual annuity of the amount of the rental. This decision was reversed in the Privy Council. The finding as to the nature of the tenure created is not overruled and seems to be accepted; the inference drawn by the Subordinate Judge from the smallness of the *jama* is noticed, and it was held that on the title of the zamindar being established, he must be presumed to be the owner of the underground rights thereto appertaining, in the absence of evidence that he ever parted with them. We are unable to distinguish that case from the present. It there seemed probable that the tenure was created after the Permanent Settlement. The present tenure may according to our view have been created either before or after that event. If however it was granted before the Permanent Settlement, the case for the Appellants is stronger than if it were granted afterwards, as the zamindar's interest at the time of the grant must have been restricted to a ten years' settlement, which may lead us to suppose that he would have been unlikely to deal with the minerals, even if he had power to do so. In the former case the *jama* reserved was low; here no *jama* at all is reserved. The area of the holding affected in *Hari Narain's* case (1) does not appear from the judgments, and in the present case the point does not help us, as we have held that the whole mauza was transferred. Had only small properties such as 54 bighas out of 200 been affected, it might have been argued that the zamindar would not have parted with his mineral rights on so small a scale, as we are admittedly deciding the case by imputing intentions to the parties, which in their ignorance of facts known to us they could never have formed: and it is this that makes the second point we have decided one of essential importance.

The rule laid down in *Hari Narain Singh* v. *Sriram Chakravarti* (1) was afterwards followed in *Durga Prasad Singh* v. *Braja Nath Bose* (2), reversing the decision in

(1) L. R. 37 I. A. 136: s. c. I. L. R. 37 Cal. 723; 14 C. W. N. 746 (1910).

(2) 16 C. W. N. 482: s. c. I. L. R. 39 Cal 696 (1912).

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this Court [see *Braja Nath* v. *Durga Prasad* (3)], but nothing else was then decided that bears on this case. In *Megh Lal Pandey* v. *Raj Kumar Thakur* (4), it was held that the insertion of such general words as *mai hak hakuk*, with all rights in the original grantor, would pass the minerals, and it is suggested that it was this decision that led to similar words being inserted into the *patta* in this case (Ex. E). On our findings however the terms of that document are of no importance. The present case closely resembles *Jyoti Prasad Singh* v. *Lachipur Coal Co.* (5), where it was held that the zamindar retained a right to the minerals, as also the case of *Kunja Behary Seal* v. *Raja Durga Prosad Singh* (6) where Fletcher, J., treats the decision in *Hari Narain Singh's* case (1) as governing the relations of a zamindar and any one deriving a title from him whether as a tenure-holder or a raiyat—a construction in which we quite agree.

In the result we hold that the zamindar did not transfer any mining rights to the predecessors of the Chakravartis.

There remains only two points to be noticed on neither of which we need say much.

The first is that the suit is barred by limitation as the Defendant and his lessees had been in possession of the mines in the land for more than twelve years. As to this we agree with the findings of the lower Court, though we think that on the facts of the case his finding is not strong enough, as the mining operations of the Katras-Jherriah Company before 1896 were obviously of the slightest possible kind.

The second remaining point is that the suit must fail, because there was a lease to Mr. Saise prior to that of the Plaintiff; and that it was subsisting at the time of the suit. This point was raised at the "very last stage" of the trial, the onus of proving the lease and its continuance up to the date of the trial was on the Defendants, and he has not discharged it. We therefore agree with the lower Court that the lease cannot stand in the Plaintiff's way.

The result is that both the appeals before us are decreed with costs.

Appeals allowed.

(1) L. R. 37 I. A 136: s. c I. L. R. 27 Cal. 723; 14 C. W. N. 746 (1910).
(3) 12 C. W. N. 193: s. c. I. L R 34 Cal. 753 (1907)
(4) 11 C. W. N. 527: s. c. I. L. R. 34 Cal. 358 (1906).
(5) 16 C. W. N. 241: s. c. I. L. R. 38 Cal. 845 (1911).
(6) Reg App. No. 197 of 1911 since reported 19 C. W. N. 203 (1914).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 97 OF 1912.

HOLMWOOD, J.
CHAPMAN, J.
1914,
28, May.

AMJADENNESSA BIBEE, Plaintiff, Appellant,
v.
RAHIM BAKSH SHIKDAR, Defendant, Respondent.

Contract Act (IX of 1872)—Agreement not to prosecute concluded without pressure or undue influence—Refund o consideration money for such agreement, suit for, if lies.

The rule of law is that, if money or security be given under an agreement not to prosecute under such circumstances that there has been pressure or undue influence, the transaction will be set aside and the money or security ordered to be returned, but it does not follow that, in every case of illegal composition of a non-compoundable criminal offence, a refund can be demanded at law and where pressure or undue influence is non-existent, a suit for refund does not lie.

Sec. 65 of the Contract Act does not apply to a case of this kind.

This was an appeal preferred on the 23rd January 1912 against a decree of Babu

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Debendra Mohan Sen, Subordinate Judge of Zilla Tipperah, dated the 30th May 1911, confirming a decree of Babu Bepin Behary Ghosh, Munsif at Chandpur, dated the 28th April 1910.

In this case the Plaintiffs sued for recovery of a sum of money alleged to have been paid by them to the Defendants as compensation for compromising a criminal case. The facts will appear from the judgment of the Subordinate Judge is appeal which is set out below :—

"This appeal arises out of a suit by the Plaintiff-Appellant, for recovery of Rs. 680, the principal sum of Rs. 535 with interest, said to have been given by the Plaintiff to the Defendants Nos. 1 to 5 for withdrawing a certain criminal case, in which the Plaintiffs were prosecuted at the instance of Defendant No. 1 for offences punishable under secs. 323 and 147 of the Indian Penal Code, in respect of the murder of Defendant No. 5's husband. The first batch of accused had been punished and the Plaintiffs were the 2nd batch of accused sent up for trial. Plaintiffs further allege that the Defendants Nos. 1 to 5 agreed to return the money in case the higher authorities prosecuted them again for the same offence as they have done.

"The Defendants Nos. 1 to 5 appear and admit having taken the money for withdrawing from the prosecution, but deny that there was any agreement to return the money, in case the Plaintiffs were again prosecuted by the higher authorities, and further say, that they fulfilled their part of the agreement by withdrawing from the prosecution and that the suit is not maintainable, as the consideration for the agreement is unlawful and against public policy, the offence under sec. 147 being a non-compoundable one.

"The learned Munsif has found that the Defendants agreed to return the money in case the Plaintiffs were again prosecuted by the higher authorities; but as the consideration for the agreement was unlawful, he has held that the suit is not maintainable, and the Plaintiffs appeal, and it is urged on their behalf that the consideration for the agreement is not unlawful and that the suit should have been decreed in full.

"When the petition for withdrawal was filed by the Defendants, the Sub-divisional Officer discharged the Plaintiffs under sec. 253 of the Criminal Procedure Code, but there was a re-trial under the orders of the District Magistrate and Plaintiffs Nos. 1 to 8 were acquitted and Plaintiffs Nos. 9 to 12 were convicted. I agree with the learned Munsif in holding, that the consideration for the contract was unlawful, the offence under sec. 147 of the Penal Code being non-compoundable. The contract was evidently made for stifling the prosecution and it is void under sec. 23 of the Contract Act (illustration *h*), and on the principles of the case cited by the learned Munsif. I observe that the Sub-divisional Officer did not sanction the term of the compromise. In fact nothing as to the payment of the money or the terms of the contract was mentioned in the petition of withdrawal.

"I next find on the evidence that the Defendants Nos. 1 to 5 performed their part of the contract by withdrawing from the prosecution; there is nothing to show that they were any way instrumental to the subsequent prosecution of the Plaintiffs. On the evidence in this case, I am disposed to hold that the Defendants did not agree to return the money if the higher authorities prosecuted the Plaintiffs again. Such a contingency does not seem to have been in the contemplation of the parties at the time, and on the evidence of the three muktear witnesses it appears that no such

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contract was made. Another muktear no doubt says that there was a contract to return the money, but in the circumstances of this case, I think that it was highly improbable that the Defendants should have agreed to return the money for a contingency for which they were no way responsible.

"In the above view of the case I hold that the suit is not maintainable and that the Defendants are not bound to refund the money as they did not agree to do so if the Plaintiffs were prosecuted again at the instance of the higher authorities.

"In the above view of the case this appeal is disallowed with cost and interest at 6 per cent. in future."

Babu Rajendra Ch. Guha for the Appellant.

Babu Satish Ch. Ghosh for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The only point raised in this second appeal is that the agreement really having been *in invito* a refund suit can be maintained in Court. We have only to point out that, neither the pleadings nor any issue, nor any finding of the lower Courts nor apparently any evidence appears in support of the question of fact that there was any pressure upon the Plaintiff to pay this money in consideration for not being prosecuted. The so-called admission of the Defendants in their written statement goes directly to the contrary.

It is urged that in every case the fear of punishment is an undue influence and that if the Defendant accepts money to screen the Plaintiff from punishment he thereby exerts this undue influence. The exceptions given by Pollock on one of which alone reliance is placed is "unless the agreement was made under such circumstances as between the parties that if otherwise lawful it would be voidable at the option of the party seeking relief." It is obviously not voidable under sec. 19 inasmuch as there was no coercion whatever, and we are unwilling to read into sec. 16 a fictitious use of the dominant position of the Defendant. The law says that not only the Defendant must have a dominant position, but he must use it, and this has been carefully guarded in all the cases in England, to a number of which we have been rather unnecessarily referred. The rule derivable from these cases can be thus stated. If money or security be given under an agreement not to prosecute under such circumstances that there has been pressure or undue influence, the transaction will be set aside and the money or security ordered to be returned. There is one rather doubtful passage in the judgment of Lord Justice Bowen in the case of *Jones* v. *Merionethshire Permanent Benefit Building Society* (1) which might be taken to extend the principle further; but the learned Judge expressed himself with extreme hesitation, and abstained from expressing any opinion on it. Were we to extend the principle in the way which we are asked to do by the learned Vakil for the Appellant, it is perfectly clear that in every case of illegal composition of a non-compoundable criminal offence, a refund can be demanded at law. We have no desire and no intention to extend the law to any such result. It has been held that sec. 65 does not apply to a case of this kind.

The appeal is therefore dismissed with costs.

Appeal dismissed.

(1) [1892] 1 Ch. 173 at p. 186.

[CIVIL APPELLATE JURISDICTION]

APPEALS FROM APPELLATE DECREES Nos. 598, 794 TO 796 AND 914 OF 1909.

MOOKERJEE, J.
BEACHCROFT, J
1913,
30, April.

HEM CHANDRA CHAUDHURI and others, Defendants, Appellants,

ATUL CHANDRA CHAKRABARTTY & anr., Plaintiffs, Respondents.

Dasturat, *nature of the right of—Immoveable property, interest in—Circumstances justifying inference as to the existence and lawful origin of—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 131—"Refusal," meaning of*

The Plaintiffs sued for a declaration of their right to recover certain sums of money as dasturat *at specified annual rates and for recovery of the sums as a charge on properties in the possession of the Defendants. It appeared that the Plaintiffs' claim for* dasturat *was asserted and allowed in Courts of law since 1795, sometimes in spite of opposition, on other occasions without opposition:*

Held—*That the inference drawn by the lower Courts that the right alleged by the Plaintiffs did exist and had a lawful origin was legitimate and the Plaintiffs had an enforceable right to realise the sums claimed as* dasturat *from the Defendants.*

That Art. 131 of the Second Schedule of the Limitation Act of 1877 was applicable to the case.

That "refusal" in Art. 131 plainly implies a previous demand and as the Plaintiffs asserted that there had been no demand and refusal within twelve years of the commencement of the present suit, the burden was cast upon the Defendants to establish that the Plaintiffs did make a demand and that the Defendants did refuse, and as there was no evidence of this demand and refusal the suit was primâ facie *not barred under Art. 131.*

That the right claimed was clearly in the nature of an interest in immoveable property being a right vested in the proprietors of a specified estate to receive certain sums of money periodically from proprietors of other estates in their character as such.

Under the Limitation Act of 1859, a suit to recover such an interest would have to be brought within twelve years from the date when the cause of action arose upon the denial or refusal of the right and as it was not shown that there was any refusal, while the Act of 1859 was in force, it must be held that the right was not extinguished before the Limitation Act of 1871 came into force.

These were appeals preferred on the 11th of April 1909 against the decree of E. E. Forrester, Esq., District Judge of Zilla Midnapore, dated the 19th of December 1908, affirming the decree of Babu Upendra Nath Biswas, Munsif, 3rd Court at that place, dated the 28th September 1907.

The facts of the case will appear from the judgment.

Babus Dwarka Nath Chackrabartty, Mohini Mohan Chatterjee and *Lalit Mohan Bannerjee* for the Appellants.

Babus Bepin Behary Ghose and *Lalit Mohan Ghose* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

These are appeals by the Defendants in suits commenced by the Plaintiffs-Respondents for declaration of their right to recover certain sums of money as *dasturat* at specified annual rates and for recovery of the sums as a charge on properties in the possession of the Defendants. The Courts below have decreed the suits. On the present appeal, two points have been taken, namely, *first*, that the Plaintiffs have no enforceable right to realise the sums claimed as *dasturat* from the Defendants; and, *secondly*, that the right, if it

ever existed, has been extinguished by operation of the statute of limitation.

In so far as the first point is concerned, it is necessary to ascertain the exact nature of the right claimed by the Plaintiffs. The Courts below have observed that the precise origin of the right cannot be traced; but it has been found that the right has a lawful origin, and the theory put forward in explanation of the origin of the right is plausible. It is stated that the predecessor-in-interest of Raja Brijnand who was the proprietor of estate Sabung transferred, towards the end of the eighteenth century, portions of his estate to different persons on condition that the latter and their representatives-in-interest would in perpetuity pay to the transferor and his representatives-in-interest certain sums as *dasturat*. Why an agreement of this description was made may not be possible to ascertain at this distance of time; but if the proprietor treated himself as entitled to the profits of the estate, he might very well reserve to himself the right to receive a portion of these protfis, although the estate itself was transferred to other persons. In any event, in 1795 when the right was asserted by the predecessor-in-interest of the present Plaintiffs and the claim was discussed by the predecessors-in-interest of the Defendants, it was found that the then Plaintiffs and their predecessors had been in enjoyment of the right from time immemorial, and it has been stated before us that at that time the period of enjoyment had extended over nearly two centuries. From these facts the Courts below have properly drawn the inference that the right had a lawful origin. The right was asserted successfully in 1795. It was again in controversy in 1854, when the claim was resisted on the ground that the sum demanded constituted an *abwab* or illegal cess. This contention was overruled by the Sudder Court [*Ram Mohun* v. *Ram Churn* (1)], and the claim of the then Plaintiffs was allowed. Later on the sum was sought to be realised as rent, but the claim was dismissed on the ground that the money could not be recovered as rent in a Revenue Court [*Ram Churn Banerjee* v. *Torita Ch. Pal* (2)]. But it is worthy of note that the decision last mentioned did not negative the right itself. We have also the fact that, on many occasions, the predecessors of the Plaintiffs obtained decrees against the predecessors of the Defendants, either upon contest or *ex-parte*, on the basis of the alleged right, though, no doubt, in some instances, the decrees were made by Revenue Courts on the erroneous assumption that the sums claimed were recoverable as rent. But although these decrees were made without jurisdiction, the fact remains that the claim was asserted and allowed, sometimes in spite of opposition, on other occasions without opposition. From all these circumstances, the Courts below have drawn the inference that the right alleged by the Plaintiffs does exist. In our opinion that inference is perfectly legitimate, and consequently the first ground taken by the Appellants must be overruled as entirely unsustainable.

In so far as the second point is concerned, the question arises whether the right has been extinguished by limitation. It is clear that Art. 131 of the Second Schedule to the Indian Limitation Act of 1877 is applicable to the case. That article provides that a suit to establish a periodically recurring right must be commenced within twelve years from the date when the Plaintiff is first refused enjoyment of the right. Now "refusal" plain-

(1) Beng. S. D. A. for 1854, p. 504.
(2) 18 W. R. 343 (1872).

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ly implies a previous demand [*Raoji* v. *Bala* (3), *Kamman* v. *Budha Singh* (4), *Durga* v. *Bhonatu* (5) and *Gohna* v. *Iklas Khan* (6)]. As the Plaintiffs assert that there has been no demand and refusal within twelve years of the commencement of the present suit, the burden is cast upon the Defendants to establish that the Plaintiffs did make a demand and that the Defendants did refuse. Of this, there is no evidence. Consequently the suit is *primâ facie* not barred under Art. 131.

But it has been contended that as there was no provision in the Limitation Act of 1859, corresponding to Art. 131 of the Limitation Act of 1877, the right now claimed might conceivably have been barred before the Limitation Act of 1871 came into force, and if the right was so barred, subsequent statutes could not operate to revive a right already extinguished under the previous statute. It is consequently necessary to determine whether the right had been extinguished under the Limitation Act of 1859. For the decision of this question, we must examine the precise nature of this right. In our opinion, the right claimed is clearly in the nature of an interest in immoveable property, as it is a right vested in the proprietors of a specified estate to receive certain sums of money periodically from proprietors of other estates in their character as such. The right on the one hand and the obligation on the other are annexed to immoveable property. In fact, the right has been so recorded ever since 1795 by the revenue authorities, and on the occasion of the sale of the estate claimed by the Plaintiffs, it had been proclaimed that the purchaser was entitled to the right to receive this *dasturat*. Now, if the right is annexed to land, it is clearly an interest in immoveable property; for as pointed out by Sir James Colville in the case of *Maharana Fateh Sangji* v. *Dessai Kallianraiji* (7) a right of this description to receive an annual payment, which has a legal foundation and of which the enjoyment is hereditary and the liability to make the payment whereof is not personal to the Defendant but one which attaches to him into whose hands the village may pass, is an interest in land; it is money payable by the Defendant *virtute tenurae*, the interest possesses the qualities both of immobility and of infinite duration in a degree which would entitle it to the character of a freehold interest in, or issuing out of, real property under the English Law (Cruise's Digest, Vol. I, p. 47, pl. 10). If then the right in question is an interest in immoveable property, under the Limitation Act of 1859, a suit to recover such an interest would have to be brought within twelve years from the time when the cause of action arose; and the cause of action would obviously arise upon the denial or refusal of the right. Consequently, the question arises, whether there was a denial of the right at any time when the statute of 1859 was in force. In this connection, it has been urged that in the litigations of 1861, the predecessors of the Defendants denied their liability to pay the sum claimed. The written statements, however, have not been produced; on the other hand, from the abstracts given in the decrees, it is clear that there was no denial of the right of the Plaintiff to receive *dasturat*. There was a denial of the liability of the Defendant on special grounds, such as the transfer of the estate into other hands. In one of the cases, indeed, there is evidence to show that not only was there no denial, there was an

(3) I. L. R. 15 Bom. 135 (1890).
(4) [1882] Punj. Rec. 146.
(5) [1883] Punj. Rec. 106.
(6) [1889] Punj. Rec. 134.

(7) L. R. 1 I. A. 34 at p. 53 (1873).

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admission of liability. One of the predecessors of the Defendants required his subordinate tenure-holder to pay the *dasturats* to the predecessor of the Plaintiffs; this justifies the inference that at that time the *dasturat* was still lawfully payable to the Plaintiffs. Under these circumstances, as it is not shown that there was any refusal while the Act of 1859 was in force, we must hold that the claim of the Plaintiffs was not extinguished before 1873, and we have already held that since 1873, nothing has happened which could extinguish the right. The second ground consequently fails.

The result is that the decrees of the Courts below are affirmed and these appeals dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE
No. 210 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 3 and
4 August.
Judgment,
4, August.

PROKASH CHANDRA GHOSH, Applicant, Appellant,
v.
HASAN BANU BIBI, Respondent, Opposite Party.

Mortgage—Demand ,or payment within term—Interest payable to mortgagee

If the mortgagee makes a demand for payment within the term and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole of the term.

This was an appeal from a decision of H. P. Duval, Esq., District Judge, 24-Parganas, dated 26th April 1913.

The facts of the case will appear from the judgment.

Babus Baidya Nath Dutt, Tarakeswar Pal Choudhury, Mohini Nath Bose and *Bhupendra K. Ghose* for the Appellant.

Babu Probodh Chandra Chatterjee for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal is directed against an award in an apportionment case under the Land Acquisition Act. The facts necessary for the decision of the question of law raised before us may be briefly stated.

On the 28th September 1912, the Appellant advanced Rs. 5,000 to the Respondent on mortgage of four properties in Calcutta. The mortgage-money was repayable on the 28th September 1913, and carried interest at 12 per cent. per annum. One of the properties given by way of security was the subject-matter of a proceeding under the Land Acquisition Act. The statutory declaration for the acquisition of the land had been published on the 2nd February 1912 and the award of the Collector made on the 20th September 1912. The record does not show whether the mortgagee was, at the time when he accepted the security, aware of the proceedings under the Land Acquisition Act; it is probable that he had no knowledge thereof, and the case has been tried on that assumption. On the 11th October 1912, the mortgagee applied to the Land Acquisition Judge that the money due under his mortgage, namely, Rs. 5,000 as principal and Rs. 600 as interest thereon for one year might be paid to him out of the compensation money. The mortgagee in substance wanted a return of the mortgage-money together with interest for the full period of one year. The mortgagor did not contest the claim for the principal amount, but urged that she was not liable to pay interest for one year. It is needless to consider whether this question could have been considered in the course of the land-

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acquisition proceeding; for no objection was taken by either of the parties, and, it is in the interest of both, that the question in controversy between them should now be finally settled. The Land Acquisition Judge has held that the mortgagee was entitled to interest only for one month, and has accordingly ordered the payment of Rs. 5,050 to him. The mortgagee is not satisfied and has appealed to this Court with a view to obtain an additional sum of Rs. 550 as interest for eleven months on the loan.

On behalf of the Appellant it has been argued that under the mortgage contract, he was entitled to interest for one year and that the mortgagor is bound to pay that sum even though the mortgage-money is re-paid on an earlier date. In support of this contention, reliance has been placed upon the decisions of the Judicial Committee in the case of *Baktwan Begum* v. *Husaini Khanum* (1). That case, however, is an authority only for the proposition that, ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. This principle is of no assistance to the Appellant. It need not be disputed that the mortgagor is not entitled to redeem before the debt becomes due; and it was held in *Brown* v. *Cole* (2) that he is not entitled to redeem before the debt becomes due, even though he may offer to pay interest for the whole period. [See also *Burrough* v. *Cranston* (3).] But in the case before us, the contract between the parties cannot be performed according to its letter, by reason of circumstances beyond the control of the parties. No doubt, the mortgagor agreed to keep the money for one year; but that was on condition that the land should remain security for the loan during the term. The land, however, has been acquired and the mortgagee has lost a part of his security. As soon as this happened, the mortgagee applied for return of the mortgage-money. The question consequently arises whether he is entitled to interest thereon for the whole of the term. We are clearly of opinion that the claim is unjust.

It is well settled that if the mortgagee makes a demand for payment within the term, and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole of the term. Reference may, in this connection, be made to the cases of *Letts* v. *Hutchins* (4), *In re Moss* (5) and *Smith* v. *Smith* (6). Indeed, where the mortgagee has given notice requiring payment within the term, he cannot withdraw it, without the consent of the mortgagor: *Santley* v. *Wilde* (7).

In the present case, the mortgagee might have called upon the mortgagor, under sec. 68 of the Transfer of Property Act, to give additional security. He did not adopt that course, and claimed a refund of the money, to which the mortgagor consented. Under these circumstances, it is plain that the mortgagor was not bound to pay interest beyond the period of one month. Reliance has finally been placed upon the provisions of secs. 108 and 114 of the Land Clauses Act, 1845, relating to the acquisition of mortgaged properties. It is sufficient to observe that the Indian legislature has not framed similar provisions applicable to this country.

The result is that the decree of the

(1) I. L. R. 36 All. 195 (1913).
(2) 14 Simon 427 (1845).
(3) 2 Ir. L. R. 203.

(4) L. R. 13 Eq. 176 (1871).
(5) 31 Ch. D. 90 1885).
(6) [1891] 3 Ch. 550.
(7) [1899] 1 Ch. 747; on app. [1899] 2 Ch. 474.

Court below is affirmed and this appeal dismissed with costs. We assess the hearing fee at ten gold mohurs.

Appeal dismissed.

[CRIMINAL REFERENCE.]

REF. No. 3 OF 1914.

FLETCHER, J.
BEACHCROFT, J.
1914,
3, December.

THE CORPORATION OF CALCUTTA
v.
MONMOTHA NATH SETT and others.

Calcutta Municipal Act (III, B. C., of 1899), secs 343, 442—Notice for removal of dilapidated hut belonging to tenant if can be served on the landlord

The definition of owner of land as given in sec. 3, sub-sec. (32), includes both the landlord and the tenant and a notice under sec. 343 for the removal of a hut belonging to the tenant can be served upon the person who is the owner of the land and such person having had a notice served upon him is liable to comply with the terms thereof.

Sec. 442 of the Act which contemplates a different set of circumstances does not in any manner abridge the power conferred by sec. 343.

This was a reference under sec. 432, Cr. P. C., made by Mr. N. C. Ghattak, Municipal Magistrate of Calcutta, on the 22nd September 1914.

The letter of reference with the supplement thereto, dated 22nd October 1914, is set out below :—

"The accused are owners of the land on which there is a dilapidated hut belonging to their tenant Jatindra Biswas. The hut is said to be dangerous to passengers. The Chairman issued a notice under sec. 343 of the Act III (B. C.) of 1899 to the owners of the land requiring them to protect the dangerous hut within one week, but as they failed to protect the hut within the time specified in the notice, they have been prosecuted before me under sec. 574/343, Act III (B. C.) of 1899. The accused tried to get the hut repaired by their tenant, but the prosecution thinks that the hut is still in a dangerous condition and that it requires re-erection. The Defendants now say that as they are not owners of the hut, it is beyond their power to protect it. The question to refer to the High Court for opinion is, whether sec. 343 of the Calcutta Municipal Act is applicable when the hut and the land on which it is built belongs to the same individual and whether notice should have been issued in this case to the owner of the hut under sec. 442 of the Act. In this case the Defendants have no power to demolish the existing structure of their tenant and to re-erect it without his consent. They may be prosecuted for house-breaking or mischief if they pull down the structure of their tenant."

"With reference to the High Court's order (Chief Justice and Teunon, J.), dated 16th October 1914, directing me 'to amend my reference by stating definitely whether the accused is the owner of the hut or not', I have the honour to state that the accused are not the owners of the hut in question that the land on which the hut is built belongs to them, but that the hut belongs to their tenant Jatindra Mohan Biswas.

"The record is re-submitted for the opinion of the High Court on my reference as to whether sec. 343 of Act III (B. C.) of 1899 is applicable in this case, or whether notice should have been issued in this case to the owner of the hut under sec. 442 of the Act."

Babu Baranashibasi Mukerjee for the Complainant.

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Babu Heera Lal Sanyal for the Defendant.

follows :—

FLETCHER, J.—This case comes before us on a reference made by the Municipal Magistrate of Calcutta in his capacity as a Presidency Magistrate under sec. 432 of the Code of Criminal Procedure. The question referred by the learned Magistrate is not very clearly stated in the letter of reference : but the learned Magistrate has sent a supplemental letter, and the question which has to be gathered from the two letters is whether sec. 343 of the Calcutta Municipal Act is applicable when the hut and the land on which it is built belong to different individuals. The case that the Magistrate has before him is a case where the tenant on the land is the owner of the hut and the only question we have to consider is whether under sec. 343 of the Calcutta Municipal Act the notice can be served upon the person who is the owner of the land. The section says that it may be served upon the owner of the land. The definition of " owner of land " obviously includes both the landlord and the tenant. " Owner of land " is defined in sec. 3, sub-sec. (32), and that obviously includes the landlord. The duty of removing a building which comes within the terms of sec. 343 after notice has been served falls clearly, amongst others, on the landlord. That seems to me to be without doubt.

Then the learned Magistrate seems to have got somewhat confused over sec. 442. He seems to have included that section in some manner in this letter of reference. Sec. 442 contemplates a different set of circumstances. What is contemplated by sec. 442 is that where in the opinion of the Chairman a building is so imminently dangerous that it is necessary to erect a hoarding to prevent it from falling on passengers—I suppose, passengers in a public street, and for that another set of provisions is enacted. But sec. 442 does not, in any manner, abridge the power that is conferred by sec. 343. Under sec. 343 the person who is the owner of the land having had a notice served upon him is liable to comply with the terms thereof. That is the only point that arises in the reference. I think, the learned Municipal Magistrate after this expression of opinion ought to have no difficulty in disposing of the case before him.

BEACHCROFT, J.—In regard to the first point of the question, it is quite clear that sec. 343 applies to the facts stated. The language of the section is clear and unambiguous.

The second part of the question is " whether notice should have been issued in this case to the owner of the hut under sec. 442 of the Act." No doubt the Chairman could have issued a notice on the owner of the hut after taking the step contemplated in the first part of the section, if he considered the building to be in such a ruinous state as to make those steps necessary. But that was a matter for the Chairman to decide. The section provides that, if he considers a building to be in so dangerous a state as to render immediate steps necessary for the safety of the public, he is to take those steps and then to serve notices on the owner and occupier. It contemplates a case of much greater urgency than sec. 343 does, and in no way limits the powers of the Chairman under the latter section.

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Contents.

NOTES.

British Company composed of enemy shareholders, if enemy person.

The Court of Appeal in England has recently decided two very long debated questions on International law with which Law Courts throughout the British Empire are more intimately concerned than other questions of public International-law. One of these is whether a company registered as a British Company is an enemy person by reason of the majority of its shareholders being alien enemies. In the case of *The Continental Tyre Company, Ld.*, it was held by Judges of the High Court in England that it was not and that the company was entitled to sue and recover its debts although only two shares out of its 25,000 (£1) shares were held by its Managing Director and Secretary in England and the remaining 24,998 shares were held by Germans and a German Company in Hanover. On appeal by the British judgment-debtors it was argued before the Court of Appeal that a Company so constituted could not be regarded in time of war as a subject of the Crown, inasmuch as a company had no mind and that it could not be loyal or disloyal to the Crown and that only the character of the shareholders would go to determine its enemy character. It was further urged at the Bar that it would be contrary to public policy to allow this company composed mostly of alien enemies to collect their debts in England.

The Court of Appeal ruled however that the question was concluded by *Jonson* v. *Drifontien Consolidated Mines (Ld.)*, [1902] A. C. 484. Their Lordships also refused to ride the unruly horse of public policy for they apprehended that once they got astride, they would not know where it might carry them. The Lord Chief Justice, the Master of the Rolls and three of their companion Lord Justices of Appeal, with only Lord Justice Buckley dissenting, observed that nothing would lead more easily to create confusion in law than to allow considerations of public policy, as distinguished from law based upon public policy, to be a ground of judicial decision. Their Lordships further observed that it was undoubtedly the policy of the law to regard substance and to disregard form, but substance must not be treated as form because that course might appear convenient in a particular case. Further that although by Royal Proclamation it was prohibited to make payments "to or for the benefit of the enemy", this prohibition did not apply when payment was made to a company and that payment to the company was not payment to alien enemy shareholders for their benefit.

We must mention however that the Plaintiff satisfied the Judges that no money had been transmitted to alien enemies since the outbreak of war. It is to be noted that Lord Justice Buckley, who is a great authority on Company law and enjoys the reputation of being a very technical lawyer, seemed to be of opinion that what his brother Lord Justices regarded as "substance" was after all a mere "form". If the British Managing Director has full powers of the Directorate of the Company, he may sue. But is he competent to exercise all the powers of the Directors and shareholders at all times? They are the company in fact and the official designation of the company may not very improperly be called a matter of "form". So it is difficult to say which of these views is more technical. The substance of the judgment so far as we can see is that the debtors should not be encouraged to make the war an excuse

for non-payment of debts. But the moral of it all is that no money should be allowed to be remitted to enemy country during war.

Reviews.

MENS REA OR IMPUTABILITY UNDER THE LAW OF ENGLAND. *By Douglas Aikenhead Stroud, LL.D. 1914. London: Sweet and Maxwell, Ld., 3, Chancery Lane. Price £1-1s.*

That the conception of *mens rea* is at the foundation of all criminal responsibility is one of the truisms of English Jurisprudence, and the fact that in some instances its existence is "conclusively" presumed so far from detracting from its universality goes rather to confirm it. To be more precise, according to English legal theory, *mens rea* must be either proved or presumed to make an act a crime.

Though the conception of *mens rea* is as old as the English theory of crimes, and criminal lawyers are confronted by it at every turn in practice, the present book, so far as we are aware, appears to represent the first attempt to deal with the subject philosophically and in all its bearings upon the various aspects of the Law of Crimes. It was written as a thesis for the degree of Doctor of Laws in the University of London, and has been approved as such; and for ample reasons, for looking carefully into the book we do not find that Dr. Stroud has spared either himself or the authorities in trying to analyse the conception in its various ramifications and arriving at correct conclusions. Dr. Stroud's method of dealing with the subject may be best appreciated by a consideration of his analysis of the excuses from conviction of crime of which he gives a chart at the outset. He subsumes these excuses under four general principles: (1) Absence of intention; (2) Absence of volition; (3) Coercion; and (4) Occasional excuse, which last cover cases of self-defence, provocation, privilege and consent. Compulsion comes under the second of these principles, incapacity under the first. Under the title of *Quasi*-crimes, is discussed that class of crimes where the intention is imputed whether absolutely or subject to rebuttal by the accused. Negligence of a certain type is one form of *mens rea* and a chapter is devoted to "Active negligence". We do not propose to go into the work in greater detail in this notice. Suffice it to say that it is a very instructive treatise on a not unfamiliar subject, and a perusal of its 300 odd pages of carefully arranged and assorted materials under the author's able guidance will be amply repaid.

MINHAJ ET TALIBIN. A Manual of Muhammadan Law, according to the School of Shafii. *By Mahiuddin Abu Zakaria Yahya Ibn Sharif en Nawawi. Translated into English from the French Edition of L. W. C. Van Den Berg. By E. C. Howard, Late District Judge, Singapore. London: W. Thacker and Co., 2 Creed Lane, E. C. Calcutta and Simla: Thacker, Spink and Co. 1914. Price Rs. 18-6.*

This publication should prove an acquisition to all students of Comparative Jurisprudence and particularly to jurists labouring in that special field of it which concerns itself with Mahomedan Law. In India, however, the views and opinions of Muhammad Ibn Idris Ash Shafii are not generally considered to be of paramount authority, that place being reserved for Abu Hanifa, who is *par excellence* the "upholder of private judgment," Shafii being, on the other hand, reckoned as a traditionist, though a traditionist of a more critical type than even his master Malik who, it is well known, combined in himself the qualities of both jurist and traditionist. Shafii, however, is not without followers even in India. There are quite a number of *Shafi-ites* in Bombay and Madras, though Africa (and particularly Egypt) is the stronghold of his doctrines. References to Shafii thus occur in Indian text-books on Mahomedan Law, though only in an occasional way. The present publication, it is explained, is not a mere translation of the Arabic text of Shafii; but is a paraphrase based partly upon the *Moharrer* and the Commentary of Mehalli, and partly upon the two principal sixteenth century commentaries on the *Minhaj et-Talibin*, that is to say, the *Tohput et Mohtaj* and the *Nihayat et Mohtaj*. In the general nature of its contents as also in other matters, the book presents instructive analogies to commentaries on Hindu Law texts. A great many things outside what at the present age is conceived to be within the province of law are dealt with, as for instance, ablution, prayer, fasting, pilgrimage and so on. Some of the subjects, such as slavery, blood price, etc., have at the present day interest only for students of archaic history. None the less in places where Shafii is recognised as an authority, the *Minhaj et Talibin* "occupies the first rank for deciding legal cases".

Mr. Abdur Rahim in his book on Muham-

madan Jurisprudence says, the doctrines of Malik (whose disciple Shafii was) were not essentially different from those of Abu Hanifa. Besides, as is well known, the divergences in opinion between the leading divisions of the Sunni school are not numerous nor very wide. Now that the *Minhaj* has been made accessible by the present publication, we expect it to be largely used in the Law Courts in India. The printing, paper and the general get-up of the work, we ought to add, call for special commendation.

Notes of Cases.

ENGLISH LAW COURTS.

THE PRIZE COURT.—Before THE RIGHT HON'BLE SIR SAMUEL EVANS, President. *The "Juno"*. 14th December 1914.

The right of the ship-owners to claim freight for cargoes condemned as prize of war—Principles for calculating the freight must be just and equitable.

In this case was raised the question of the right of the ship-owners to claim the freight and other expenses due from cargoes condemned as lawful prize. The "*Juno*" was a British vessel and certain cargoes were shipped on board that vessel at Bristol for Amsterdam, destined for various places in Germany. On August 24th, certain goods on board that vessel were seized at Swansea as enemy goods, and subsequently were condemned by the Court as lawful prize.

The ship-owners now claimed the full freight as having become due on shipment. It was contended for the Crown that no freight should be allowed, because of an incapacity to the ship, as she was prevented by law from performing her contract. The learned Judge repelled that contention and held that such freight ought to be allowed as was equitable and just, having regard to the facts and circumstances of each case. In the course of his judgment he said :—

The questions which I have now to determine are *primæ impressionis;* they come before the Court for decision for the first time so far as I am aware. While there are no rules of law or decisions to bind or guide the Court, the problems can, I think, be solved without great difficulty by a rational application of fair and equitable considerations. The Prize Court has always claimed to exercise equitable jurisdiction, using that term in its broadest sense and not in its more technical Chancery meaning.

Counsel for the claimants contended that they were entitled to the full freight for two reasons : —(1) because by the contracts the freights were due on shipment; and (2) because, as in the case of neutral ships in former days, capture was said to be regarded as delivery, and full freight was given to neutral ship-owners; and so it should now be given to British ship-owners.

For the Crown it was contended that no freight should be allowed or, if any, not the whole freight, because an incapacity attached to the ship, as she was prevented by law from performing her contract to deliver the goods to the consignees; and because the non-completion of the voyage was not due to the "incapacity of the cargo to proceed."

The short answer to the first contention of the claimants is that there is no contract to which the Court can look which is applicable to the existing facts. This Court has no concern, touching the matter now in question, with the contracts between the ship-owners and shippers, or cargo-owners.

As to the second contention, a neutral vessel and a British vessel are not in the like case or condition. Even before the Declaration of Paris a neutral vessel had the full right to carry enemy goods into an enemy country, subject to the risk of her detention by belligerent for the purpose of seizing the goods; and this was the foundation of the principle, which, generally speaking, secured to them their full freight: The "*Fortuna*", (1809, Edw. 56, 2 E. P. C., 17) and the "*Prosper*" (1809 Edw. 72).

Since the Declaration of Paris and, indeed, before that, by the practice adopted in the Crimean War, neutral vessels laden with enemy goods could not be prevented from continuing their voyages and so earning their freight, except where the goods were contraband, or where the pursuit of the voyage would amount to a breach of blockade; and in these cases no freight would be allowed. With British vessels it is quite otherwise. They must not carry enemy goods or proceed on voyages for which such goods were shipped. In the present case there was accordingly an "incapacity to proceed," attributable not only to the cargo, but also to the ship.

It would not be right, however, to withhold from the ship-owners all the freight on account of the "incapacity of the ship," where the shipment took place before war, and the voyage was partly accomplished. What, then, ought to be the rule? It is possible that even if the cargo is not carried to its destination, it would be just in some cases that the whole amount of

the freight should be paid. For instance, suppose an enemy cargo were shipped before the war from Australia for Hamburg and were seized near British waters and taken to Bristol, it may be that it would be fair to pay the ship-owners the full freight.

On the other hand, suppose a cargo of enemy goods had been shipped before the war for Bristol and destined for Cameroon, or Kiaochau, and were seized at Swansea, it would be wholly inequitable for the ship-owners to claim, or for the captors to be subject to, payment of the full freight, even though by the contract it was due on shipment at Bristol.

In the present case, where only a comparatively small part of the voyage was made, I think the whole freight ought not to be allowed. What part should be allowed I will refer to the Registrar and merchants to say, but I must give them some direction or guidance, although no strict rule can be laid down which would be universally applicable. Cases differ greatly. The phrase *pro rata itineris* has been used in some cases. But this does not import a mere arithmetical calculation of distances or times.

The only rule which I state for the guidance of the Registrar and merchants is this :—Such a sum is to be allowed for freight as is fair and reasonable in all the circumstances, regard being had to the rate of freight originally agreed (although this is not necessarily conclusive in all cases) to the extent to which the voyage has been made, to the labour and cost expended, or any special charges incurred, in respect of the cargo seized before its seizure and unlivery, and to the benefit accruing to the cargo from the carriage on the voyage up to the seizure and unlivery; but no sum is to be allowed in respect of any inconveniences or delay attributable to the state of war, or to the consequent detention and seizure.

As to the items for extra cost of discharging and shifting the goods at Swansea, these should go against the cargoes, and should be allowed.

I allow the claim of the claimants to some freight and to the special items mentioned, and order a reference to the Registrar and merchants to ascertain the amount.

Messrs. Bateson, K. C., and *Balloch* for the Crown

Mr. R. C. Dunlop for the Claimants.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION.—Before D. CHATTERJEE and CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE No. 2620 OF 1912. ADILUDDI SHEIK AND OTHERS, Plaintiffs, Appellants *v.* FAJAL SHEIKH AND OTHERS, Defendants, Respondents. Heard, 18th and 22nd January. Judgment, 22nd January 1915.

Ejectment—Abandonment—Bengal Tenancy Act (VIII of 1885), sec. 87—Rent, non-payment of.

The tenant having rights of occupancy executed a usufructuary mortgage in respect of the holding and at the same time gave up possession of the land to the mortgagee. This was in 1887. In 1899 he took a further advance from the same mortgagee and executed in his favour a *kat-kobala* purporting to make over possession of the land in lieu of interest. In 1906, the mortgagee brought a suit for foreclosure and had a decree and possession thereunder. The present suit was brought by the landlords in 1909 on the allegation that since 1313 the tenant Defendant had given up the land without making any arrangement for payment of the rent and that the contending Defendants were trespassers and were not entitled to retain possession of the land as against the Plaintiffs who were the landlords. The lower Appellate Court held that from 1887 the mortgagee had been in possession and from that time there had been no payment of rent to the Plaintiffs, the landlords. It further came to the conclusion that there was an abandonment within the meaning of sec. 87 of the Bengal Tenancy Act.

Held, that in order that there might be an abandonment under sec. 87 of the Bengal Tenancy Act, there must be a finding that the tenant had left the village in which the holding was situated without making any arrangement for payment of the rent.

That it was quite open to the lower Appellate Court to hold that independently of sec. 87 of the Bengal Tenancy Act, there was an abandonment by the tenant which would entitle the landlords to enter into *khas* possession.

Babu Surendra Chandra Sen for the Appellants.

Babu Taradas Chatterjee for the Respondents.

Appeal allowed;
Case remanded.

A. T. M.

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHABAD.]

LORD DUNEDIN.
SIR JOHN EDGE.
LORD SHAW.
MR. AMEER ALI.
1914,
Heard, 23, 26 and 27, October
Judgment, 25, November.

KUNWAR DIGAMBAR SINGH, Appellant,
v.
KUNWAR AHMAD SAYEED KHAN, Respondent.

Pre-emption, customary or contractual right of,—Proof—*Wajib-ul-arzes, *statements in,* primâ facie *evidence of custom—Statements, value of, unsupported by evidence of instances in which custom enforced—Custom not contrary to law—Recent origin of custom—Partition, perfect, of mahal subject to custom—Co sharer in one separated mahal if may pre-empt property in another—Question of construction of* wajib-ul-arz *one of intention.

Pre-emption in village communities in British India had its origin in the Mahomedan Law as to pre-emption, and was apparently unknown in India, before the time of the Moghul rulers. In the course of time, customs of pre-emption grew up or were adopted among village communities. In some cases, the sharers in a village adopted or followed the rules of the Mahomedan Law of pre-emption, and in such cases the custom of the village follows the rules of the Mahomedan Law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Mahomedan Law of pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption was doubtless, in all cases, the result of agreement amongst the shareholders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Right of pre-emption has in some provinces been given by Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is as far as is possible to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved.

Held—*That in the* wajib-ul-arzes *of 1863 and 1870, which were the only evidence to prove the existence of an alleged custom of pre-emption, was set out what the sharers had in those years agreed to be the custom of pre-emption in the mauza.*

In agreeing as to the custom of pre-emption which should be inserted in the wajib-ul-arzes, *the sharers were not trying to establish any rule of inheritance in the mauza inconsistent with the Mahomedan or the Hindu Law of inheritance and the statements in the* wajib-ul-arzes *as to rights of pre-emption are reliable evidence of a custom of pre-emption. The evidence as to the custom afforded by the* wajib-ul-arzes *may be rebutted by other evidence. But to hold that a* wajib-ul-arz *is not by itself good* primâ facie *evidence of the custom of pre-emption stated in it and requires to be corroborated by evidence of instances in which the custom has been enforced would be to increase the costs of litigation in pre-emption cases, and in many cases might practically deprive a sharer of his rights.*

Where there has been perfect partition of a mauza subject to a custom of pre-emption, a sharer in one of the new mahals cannot claim to pre-empt property in another of those mahals in which he is not a sharer unless he shows either on the construction of the wajib-ul-arzes *or by other evidence, that the custom survived the partition so as to give such a right.*

Where a fresh wajib-ul-arz *has not been prepared at partition, it does not follow as a matter of law or principle that*

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the custom or contract in force before partition is no longer to have effect or operation. The question must depend upon the circumstances of each case and the inferences which may legitimately be drawn from the evidence.

Held—*That no inference could be drawn from the* wajib-ul-arzes *and the circumstances of the present case that it was intended that in case of a perfect partition of the parent mauza, a sharer in one mahal should have a right of pre-emption in another mahal in which he was not a sharer.*

This was an appeal from a judgment and decree, dated the 15th July 1912, of the High Court of Judicature for the North-Western Provinces, Allahabad, which reversed a judgment and decree, dated the 28th March 1911, of the Court of the Subordinate Judge of Aligarh.

The facts of the case shortly stated were :—In 1906 the village of Pala Kher was divided into five separate and independent mahals by "perfect partition," and one of them was called Mahal Bhawani Das after its owner Bhawani Das. A portion of the lands in the said mahal was in the possession of the Respondent under a usufructuary mortgage.

By a conveyance, dated the 12th July 1909, and registered on the 6th August 1909, the said Bhawani Das sold his zamindary situate in the said mahal to the Respondent, and the Respondent took possession thereof.

On the 6th August 1910, the Plaintiff instituted the present suit in the Court of the Subordinate Judge of Aligarh. In his plaint he stated that he was a sharer in the said village Pala Kher. He further alleged that there prevailed in the village a custom of pre-emption under which the Plaintiff was entitled to purchase the said zamindary in dispute in preference to the Defendant-Respondent.

In order to prove the existence of the custom of pre-emption alleged by him, the Plaintiff produced two *wajib-ul-arzes* of Mauza Pala Kher which were prepared in 1863 and 1870 when the village was admittedly joint. The material entries in the *wajib-ul-arzes* are set out in their Lordships' judgment.

The Subordinate Judge who tried the case delivered judgment on the 28th March 1911. He held that the terms of the said *wajib-ul-arzes* were sufficient to establish that there existed a custom of pre-emption in the said village. He was of opinion that the "perfect partition" of the village and the fact that no *wajib-ul-arz* was prepared at the time of the "perfect partition" made no difference to the original right of pre-emption. He held that the Defendant was a stranger to the mahal.

Against the said decree the Defendant appealed to the High Court of Judicature for the North-Western Provinces, Allahabad. The appeal was heard by Sir Henry Richards, C. J., and Mr. Tudball, J., who delivered separate judgments on the 15th July 1912.

In the course of his judgment the learned Chief Justice observed as follows :—

(*a*) "I have already pointed out that while the Defendant-vendee was a mortgagee in possession of a substantial part of the Mahal Bhawani Das, the Plaintiff had no property in that mahal at all. The Plaintiff was not a co-sharer in any property with the vendor. No joint and several responsibility existed between the Plaintiff and the vendor for the payment of revenue. The Plaintiff had no right to interfere in any way with the management of any part of the property comprised in the Mahal Bhawani Das. He

was a total "stranger" in the sense that he did not belong to the co-parcenary body which held Mahal Bhawani Das.

(*ii*) "I pause for a moment to consider the state of things in the village in the years 1863 and 1870. At that time every proprietor in the village was a co-sharer with the others in the unit, *viz.*, the village. Does it not follow that the *wajib-ul-arzes* of 1863 and 1870 are of little or no value in considering the question of the existence of an alleged custom giving a right of pre-emption to a person who is not a co-sharer and has no community of interest or responsibility with the vendor?

(*iii*) "The result of perfect partition is that the old co-parcenary body ceases to exist and new co-parcenary bodies in each mahal are created. If the reasons for customs of pre-emption is to avoid the introduction of a stranger, the custom which the Plaintiff alleges would defeat the object. In the events that have happened, the Plaintiff is now an outsider so far as Mahal Bhawani Das is concerned.

(*iv*) "As already stated, the evidence consists, practically speaking, of the *wajib-ul-arz* of 1863 and the *wajib-ul-arz* of 1870. It seems to me that these documents almost negative the existence of any custom of pre-emption. . . . .

"These circumstances seem strongly to suggest that it was not an existing custom that was being recorded in the *wajib-ul-arz*, but an arrangement for the future between members of the co-parcenary body, including the mortgagees of such members thereof as had mortgaged their shares."

Mr. Justice Tudball agreed with the learned Chief Justice and made among others the following observations :—

"After the partition which was a perfect partition, the Plaintiff's mahal and the vendor's mahal became as separate in every way as two separate villages, and there remained no community of interests between their owners. Each of the latter became a stranger to the mahal of the other. The custom gave no right of pre-emption to a person who was not a co-sharer in the mahal in which the vended property was situate.

"Lastly, the vendee in the present case being a mortgagee with possession in the same mahal as the vendor, would, under these *wajib-ul-arzes*, if they had any force as evidence of custom, be entitled to purchase even as against the pre-emptor."

In conclusion the learned Judges held that the Plaintiff had failed to establish that he had a right of pre-emption against the Defendant. They accordingly made a decree allowing the said appeal, and dismissing the Plaintiff's suit with costs in both Courts.

Hence this appeal.

Mr. G. R. Lowndes for the Appellant submitted that the *wajib-ul-arzes* of 1863 and 1870 recorded the custom of pre-emption that prevailed in Mauza Pala Kher. It was not a record of a contract of pre-emption, as before 1873 no agreements were required to be recorded. The record was made in accordance with the "Directions for Revenue Officers in the North-Western Provinces of the Bengal Presidency", and subsequently under the provisions of Act XIX of 1873. It was purely a Mahomedan village and all the proprietors signed the *wajib-ul-arz*. The custom of pre-emption gave the right of pre-emption to every *sharer* in the village and not to *co-sharers* alone. In the absence of any evidence that the custom had ceased to exist, or the right of pre-emption had been varied or abandoned by the shareholders on the subsequent partition of the village in 1906, the Plaintiff's right of pre-emption still sur-

vived. The onus lay upon the Defendant to shew that the right of pre-emption, which the Plaintiff did possess up to 1870, was lost by the partition of the village. Being a Mahomedan village, mere partition will not annul a custom. The partition of the village in 1906 was not a "perfect partition". "Perfect partition" under sec. 107 of Act XIX of 1873 meant the division of a "Mahal" into two or more "Mahals", and "Mahal" was defined by sec. 3 thereof as "a local area for which revenue has been assigned, and for which a separate record-of-rights has been framed." No separate record-of-rights was framed here. No new *wajib-ul-arz* having been prepared at the time of partition, the old custom of pre-emption still prevailed. The right of pre-emption belonged to the proprietors of the village. The word "village" in the vernacular was presumably "deh" or "gaon", which meant a definite physical area of land: *Gokul Singh* v. *Mannu Lal* (2). Reference was made to the following authorities:—*Ghure* v. *Man Singh* (3), *Dalganjan Singh* v. *Kalka Singh* (1), *Janki* v. *Ram Partab Singh* (4), *Sardar Singh* v. *Ijaz Husain Khan* (5), *Gobind Ram* v. *Masih-Ullah Khan* (6), *Sahib Ali* v. *Fatima Bibi* (7), *Returaji Lubain* v. *Pahlwan Bhagat* (8) and *Chephur* v. *Abdul Hakim* (9).

Messrs. L. DeGruyther, K.C., and *Bhugwandin Dubé* for the Respondent submitted that the Plaintiff had failed to establish that he had a right to pre-empt. If it were a question of Mahomedan Law, the partition of the village put an end to the right of pre-emption. The very foundation of the right was based on co-partnership and partition destroys it: Hamilton's Hedaya, Book 38, Ch. 1. Under Mahomedan Law it was purely a personal right unconnected with the land, and would not survive in favour of his heirs unless the right had been completely exercised. Hindus had also adopted the Mahomedan Law of pre-emption, and in all such cases the extinction of joint ownership put an end to the custom of the right of pre-emption: *Jadu Lal Sahu* v. *Janki Koer* (10), *Jadu Lal Sahu* v. *Janki Koer* (11), *Digambur Misser* v. *Ram Lal Roy* (12), *Joobraj Singh* v. *Tookun Singh* (13) and *Gopal Sahi* v. *Ojoodheapershad* (14). The partition was a "perfect partition" within the meaning of sec. 107 of the North-Western Provinces Land Revenue Act. The partition proceedings shewed that all the joint rights and interests were absolutely severed in accordance with the law. The fact that no separate record-of-rights was framed in respect of the new mahals could not affect the nature of the partition. A "perfect partition" of a "mahal" puts an end to the right of pre-emption. (Thomson's Directions for Settlement Officers, 1858, pp. 1, 50, 53, 70, 71 and 237.) The word "village" in the *wajib-ul-arz* did not mean a physical area, but a revenue-paying unit or "mahal": *Badri Prasad* v. *Hashmat Ali* (15) and *Mathra Prasad* v. *Nem Chand* (16). In any case, the onus was on the Plaintiff to establish that after the partition of the village he had a right to pre-

(1) I. L. R. 22 All. 1 (1899).
(2) I. L. R. 7 All. 772 (1885).
(3) I. L. R. 17 All 226 (1895).
(4) I. L. R. 28 All. 286 (1905).
(5) I. L. R. 28 All. 614 (1906).
(6) I. L. R. 29 All. 295 (1907).
(7) I. L. R. 32 All. 63 (1909).
(8) I. L. R. 33 All. 196 at p. 217 (1910).
(9) I. L. R. 33 All. 296 (1910).

(10) I. L. R. 35 Cal 575 at p. 6 0 (1908).
(11) L. R. 39 I. A. 101: s. c. 16 C. W. N. 553 (1912).
(12) I. L. R 14 Cal. 761 (1887).
(13) 14 Suth. W R. 476 (1870).
(14) 2 Suth. W. R 47 (1865).
(15) 1 All. L J. 85 (1904).
(16) 2 All. L. J. 261 (1905).

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empt. There was no evidence except the *wajib-ul-arzes* of 1863 and 1870 which did not prove the Plaintiff's case. The right which the Plaintiff was setting up was contrary to the Mahomedan Law, as well as the general law. The right of "shufa" was a precarious right, and must be strictly proved. The Defendant was not a stranger, inasmuch as he was a mortgagee of a portion of the lands in the "mahal" sold. The *wajib-ul-arz* made a provision for perfect partition of the village, and if it has been intended that a sharer in the new "mahal" should have a right of pre-emption in respect of a totally separate mahal, it would have said so. Reference was made to *Jagdam Sahai* v. *Mahabir Prasad* (17), *Dalganjan Singh* v. *Kalka Singh* (1) and *Ganga Singh* v. *Chedi Lal* (18).

Mr. Lowndes replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE. The suit in which this appeal has arisen was brought on the 6th August 1910 in the Court of the Subordinate Judge of Aligarh by Kunwar Digambar Singh, who is the Appellant here, against Kunwar Ahmad Sayeed Khan, who is the Respondent to this appeal, and one Bhawani Das, to enforce a right of pre-emption to which Kunwar Digambar Singh claimed to be entitled, under a custom which he alleged to be prevailing in Mauza Pala Kher in the District of Bulandshahr.

The Respondent here, Kunwar Ahmad Sayeed Khan, who was the vendee of th property in dispute, by his written statement denied that there was any custom of pre-emption in Mauza Pala Kher and alleged that

(1) I. L. R. 22 All. 1 (1899)
(17) I. L. R. 28 All. 69 (1905).
(18) I. L. R. 33 All. 605 (1911)

"Mauza Pala Kher was divided by perfect partition and entirely separate mahals were formed . . After the said partition no connection of any kind was left among the co-sharers of the different mahals, nor did any joint right, based on the terms of any *wajib-ul-arz*, subsist among them."

The date of the sale in respect of which pre-emption is claimed was the 12th July 1909 In 1905, Mauza Pala Kher, otherwise known as Mauza Pala Kaser, and as Mauza Bilaksir, was, on the applications of certain of the then sharers in the mauza, partitioned into five mahals, of which two were named respectively Salig Ram and Bhawani Das. On the partition each of the five newly formed mahals became separately responsible for the revenue assessed upon it, b did not become responsible for the revenue assessed upon any other of the five mahals. No separate record-of-rights was before this suit framed for any of the five new mahals.

The property sought to be pre-empted is in Mahal Bhawani Das, in which mahal the Appellant had not a share at the date of the sale; he was, however, at that date a sharer in Mahal Salig Ram, in which mahal neither the Respondent nor his vendor, Bhawani Das, was a sharer. The Respondent was not at the date of the sale a sharer in any of the five new mahals; he was, however, the mortgagee in possession of part of the share of Bhawani Das, the vendor, in Mahal Bhawani Das. The Appellant and Bhawani Das are not related to each other. The Respondent, who is a Mahomedan, is not related to the Appellant or to Bhawani Das. Prior to the partition of 1905 Mauza Pala Kher was an unpartitioned mauza in which the Appellant and Bhawani Das were sharers. Of the history of Mauza Pala Kher prior to 1863 their Lordships are unaware, but in 1863 all the sharers in the mauza were apparently Mahomedans.

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The evidence to prove the custom of pre-emption upon which the Appellant's claim is based consisted of extracts from a *wajib-ul-arz* of Mauza Pala Kher, of 1863, upon extracts from a *wajib-ul-arz* of the same mauza of 1870, and of a judgment of the Subordinate Judge of Meerut in 1875 in a suit for pre-emption which was confirmed by the High Court at Allahabad in 1876. The cause of action in that case arose of course long anterior to the partition of Mauza Pala Kher, but the judgments do afford evidence that there existed in Mauza Pala Kher a custom of pre-emption under which a relation of a vendor—sharer in the mauza—was entitled to pre-empt on a sale to a stranger to the mauza, but that is not the custom upon which the Appellant must rely in this suit.

The extract from the *wajib-ul-arz* of Mauza Pala Kher, which was prepared the 16th June 1863, as translated and so far as it is material, is as follows :

"In future every co-sharer mortgagor or mortgagee shall as such be at liberty to make transfers. But he shall make transfers first in favour of his own and *ekjaddi* brothers and after them in favour of co-sharers in the *khata* and *patti* as well as in favour of the proprietors of the village. If none of them take, he shall be competent to make transfers in favour of strangers. If there is a dispute regarding difference in consideration, it shall be decided by arbitration."

The *wajib-ul-arz* of 1863 was signed by all the sharers and by some, if not all, of the mortgagees.

The corresponding clause in the *wajib-ul-arz* of 1870, as translated in the record, is as follows :—

"In future co-sharer mortgagor or mortgagee has as such power. He shall have power to make transfers first to his own and *ekjaddi* brothers and next to co-sharers in the *khata* and *patti* as well as to proprietors. If none of the aforesaid persons takes, he shall have power to transfer it to a stranger. If there arises any dispute as regards the price being more or less, it shall be decided by arbitration."

In paragraph 14 of the *wajib-ul-arz* of 1870 it is expressly stated : "Custom as to pre-emption—Pre-emption is allowed." There can be no possible doubt that the clauses to which their Lordships have referred set out what the sharers in Mauza Pala Kher had in 1863 and in 1870 agreed to be the custom of pre-emption in the mauza. It is to be presumed, as the contrary has not been shown, that the *wajib-ul-arz* of 1863 and the *wajib-ul-arz* of 1870 had been properly prepared in accordance with the law then in force, and with the "Directions for Revenue Officers in the North-Western Provinces of the Bengal Presidency," which had been promulgated under the authority of the Lieutenant-Governor of those provinces.

The references in the clauses above mentioned to mortgagors and mortgagees are obscure. The sharers in Mauza Pala Kher may have intended that if a mortgagor should assign his interest as a mortgagor, he should offer it in the first instance to his own or his *ekjaddi* brother and then to a sharer in the *khata* and *patti*, or to a proprietor in the mauza, and if they should refuse to purchase it, he might assign it to a stranger, and in the same way if a mortgagee should wish to assign his mortgagee's interest, his right to assign it should be similarly limited. In their Lordships' opinion it was not meant by the clauses to which they have referred to treat mortgagees as such as sharers in the mauza and to confer on them a right to pre-empt.

Having regard to some of the decisions of the High Court of Allahabad, which have been referred to in the arguments in this appeal, it is unfortunate that the record which is before this Board does not show what was the vernacular word in

the *wajib-ul-arzes* of 1863 and 1870, which has been translated as "co-sharer," or what was the vernacular word in the *wajib-ul-arz* of 1863 which has been translated as "village."

The *wajib-ul-arz* of 1863 contained a clause as to partition which, as translated in the record, was as follows :—

7. Partition, separate and compact.

"Every one can get his property partitioned to the extent of his share. And, if the area be compact, he can also get a separate *mahal* formed. If at the time of partition the grove of one person comes to be included in the lot of another, the planter of the grove shall remain in possession as before, but the planter shall (have to) give land of the same quality in exchange. As to a well, the costs of construction shall be given to the person who constructed it. If the *khudkast* land of one person comes into the possession of another, then he (the person in possession) shall relinquish it of his own accord or shall pay rent as a tenant "

It appears to their Lordships that it may reasonably be inferred from this clause that the sharers of 1863 in Mauza Pala Kher not only contemplated that the mauza might subsequently be partitioned into separate *mahals*, but also intended that on a partition off from the mauza of a separate mahal, the sharers in the other mahals or in the unpartitioned portion of Mauza Pala Kher should as such have no share or other proprietary interest in the separated mahal. It does not appear from the extracts from the *wajib-ul-arz* of 1870, which are printed in the record, whether the *wajib-ul-arz* of 1870 contained a similar clause, but it probably did.

It appears from the *rubkar* of the 5th December 1902 which was drawn up for the carrying out by the *Amin* of the partition of Mauza Pala Kher that the partition should be a perfect partition; that a grove should be allotted to the mahal of the person who had planted it, and that a Mahomedan tomb, which stood in the *abadi*, should be allotted to the share of the Mahomedans.

The Subordinate Judge of Aligarh found that a custom of pre-emption prevails in Mauza Pala Kher; that the partition of the mauza and the separation of the Plaintiff's Mahal Salig Ram from that of the vendor did not affect the custom of pre-emption: and that the Plaintiff, the Appellant here, had a right to pre-empt as against the vendee, the Respondent here; and on the 28th March 1911 he gave the Appellant a decree for pre-emption. From that decree Kunwar Ahmad Sayeed Khan, the Respondent here, appealed to the High Court of Judicature at Allahabad.

The Chief Justice and Mr. Justice Tudball, before whom the appeal came for hearing, allowed the appeal and dismissed the suit. From the decree of the High Court this appeal has been brought.

Pre-emption in village communities in British India had its origin in the Mahomedan Law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time, customs of pre-emption grew up or were adopted among village communities. In some cases, the sharers in a village adopted or followed the rules of the Mahomedan Law of pre-emption, and in such cases the custom of the village follows the rules of the Mahomedan Law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Mahomedan Law of pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the shareholders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of

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pre-emption have in some provinces been given by Acts of the Indian Legisla Rights of pre-emption have also been created by contract between the sharers in a village. But in cases the o ect is as far as is possible to preve strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved.

The only evidence in this case to prove that the custom, which is relied upon by the Appellant, existed in Mauza Pala Kher, is afforded by the clauses relating to pre-emption which are contained in the *wajib-ul-arzes* of 1863 and 1870. These clauses do, in the opinion of their Lordships, prove that prior to the partition of Mauza Pala Kher, the custom of pre-emption, which is set out in the second paragraph of cl. 2 of the plaint, existed and was in force in Mauza Pala Kher, but that would not be sufficient to entitle the Appellant to a decree It would be necessary for him to show, either on the construction of the *wajib ul-arzes* or by other evidence, that the custom of pre-emption which obtained in the unpartitioned Mauza Pala Kher would survive a partition of that mauza into separate mahals so as to give a sharer in one of the new mahals a right to pre-empt property in another of those mahals in which he was not a sharer at the date of the sale.

This question was very carefully considered by a Full Bench of the Allahabad High Court in *Dalganjan Singh* v. *Kalka Singh* (1), in which Sir Arthur Strachey, C. J., and Mr. Justice Banerji considered that the question in each case is that of the construction of the nature of the particular custom on which the claim for pre-emption is based, and whether the custom can apply to the altered state of things which comes into existence when a perfect partition has been effected. In that case as in this no new *wajib-ul-arz* was framed on the partition. Their Lordships are not prepared to dissent from the view of Mr. Justice Banerji in the case which has been referred to, that "where a fresh *wajib-ul-arz* has not been prepared at partition, it does not follow, as a matter of law or principle, that the custom or contract in force before partition is no longer to have effect or operation." The question must depend upon the circumstances of each case and the inferences which may legitimately be drawn from the evidence. In the present case their Lordships cannot overlook the fact that in 1863 all the sharers in Mauza Pala Kher were Mahomedans; that Hindus were obtaining interests in the mauza as mortgagees; and that the sharers in 1863 were contemplating that the mauza might be partitioned. The right to obtain perfect partition, of course, existed. Nor can their Lordships overlook the fact hat in 1905, when perfect partition was applied for, Hindus had become sharers in Mauza Pala Kher and that nothing was done on partition to provide that sharers in one mahal should have a right of pre-emption in respect of a sale in another mahal in which they were not sharers. Their Lordships are unable to draw the inference from the *wajib-ul-arzes* and the circumstances in this case that it was intended that, in case of a perfect partition of Mauza Pala Kher, a sharer in one mahal should have a right of pre-emption in another mahal in which he was not a sharer.

The learned Judges who decided the appeal in this case in the High Court apparently considered that the evidence afforded by the *wajib-ul-arzes* of 1863

(1) I. L. R. 22 All. 1 (1899).

and 1870 did not prove any custom of pre-emption, and each of them also relied upon the fact that no evidence that the right of pre-emption has been exercised was given. The learned Chief Justice also apparently suggested doubts as to the value of a *wajib-ul-arz* as evidence of a custom of pre-emption when unsupported by evidence that the custom had been enforced. As their Lordships have already intimated, they have no doubt that the clauses relating to transfers of shares in the *wajib-ul-arzes* of 1863 and 1870 stated what the sharers in 1863 and the sharers in 1870 had agreed was the custom of pre-emption in Mauza Pala Kher. These clauses were inartistically drafted. The Kanungo or other official who collected information from the sharers in the mauza may have been a person who was as ignorant as they were of legal forms and legal phraseology, but before the *wajib-ul-arzes* were signed by the sharers or sanctioned by the Settlement Officer, the sharers had an opportunity of objecting to any statements contained in them which they did not understand or did not consider to be correct. Pre-emption was a matter in which all the sharers were interested; it was a matter as to which they could agree as to what the custom in their mauza was. Pre-emption, with various incidents, limitations, and restrictions, prevails by custom or by special agreement amongst shareholders in very many, if not in most or all, of the village communities in the province in which Mauza Pala Kher is situate.

In agreeing as to the custom of pre-emption which should be inserted in the *wajib-ul-arzes* the sharers were not trying to establish any rule of inheritance in the mauza inconsistent with the Mahomedan or the Hindu Law of inheritance, and their Lordships fail to see on what principle statements in a *wajib-ul-arz* as to rights of pre-emption, which are not in contravention of Mahomedan, Hindu or other Law, should not be considered as reliable evidence of a custom of pre-emption. To hold that a *wajib-ul-arz* is not by itself good *primâ facie* evidence of a custom of pre-emption which is stated in it and that the *wajib-ul-arz* requires to be corroborated by evidence of instances in which the custom has been enforced would be to increase the costs of litigation in pre-emption cases, and in many cases might practically deprive a sharer of his right. Of course the evidence as to a custom of pre-emption afforded by a *wajib-ul-arz* may be rebutted by other evidence.

The Appellant has failed to prove that he is entitled to a decree. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The Appellant must pay the costs of the appeal.

Solicitors *Messrs T. L. Wilson & Co.* for the Appellant.

Solicitor *Mr Douglas Grant* for the Respondent.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 400 OF 1911.

FLETCHER, J.
RICHARDSON, J.
1914,
Heard, 21 and 22, July
Judgment, 27, July

THE GARDEN REACH SPINNING AND MANUFACTURING CO., Appellants, Petitioners,
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Respondent, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. XLI, r. 27, Or. XLVII, r. 1—Appellate Court, power of, to admit fresh evidence—Application for the admission of such evidence before the hearing of appeal, if lies

GARDEN REACH SPING. AND MANFG. CO. *v.* SECY. OF STATE FOR INDIA IN COUNCIL.

Where in an appeal against a decree of the Land Acquisition Judge, the Appellant before the commencement of the hearing made an application to the High Court for the admission of certain additional evidence consisting of certain documents leading up to and resulting in a compromise of another case with reference to the acquisition of an adjoining premises, which was arrived at after the appeal was filed in the High Court:

Held—*That the powers of an Appellate Court to admit futrher evidence are governed by the provisions of Or. XLI, r. 27, which do not authorise an Appellate Court to admit fresh evidence, documentary or oral, and whether or not it was in existence at the time of the judgment of the lower Court or at the time the appeal was preferred unless the Appellate Court after examining the evidence on the record comes to the conclusion that it requires the additional evidence in order to enable it to pronounce judgment, namely, that there is a defect on the evidence on the record.*

A preliminary application before the hearing of the appeal is not warranted by the terms of Or. XLI, r. 27, and the Court had no jurisdiction to entertain it.

An application to admit fresh evidence discovered out of Court by the parties comes under Or. XLVII, r. 1, and not under Or. XLI, r. 27.

This was an application, dated 16th July 1912, for an order that additional evidence be taken by the High Court in the above appeal preferred by the Applicant, against the judgment of A. Goodeve, Esq., Land Acquisition Judge, 24-Parganas, dated 2nd June 1911.

The circumstances in which it was made are set out in the Court's order.

Messrs. Pugh and *Cubitt* (with *Babus Surendra Nath Roy, Satyendra Nath Roy* and *Narendra Nath Sett*) for the Petitioners.

Messrs. S. P. Sinha and *Caspersz* (with *Babus Ram Charan Mitra* and *Ambica Pada Chaudhuri*) for the Opposite Party.

The ORDER OF THE COURT was as follows:—

FLETCHER, J.—This is an application by the Appellants for the admission of certain additional evidence in an appeal we are about to hear.

The appeal itself is with reference to the amount to be paid by the Government as compensation for the property of the Appellants which has been compulsorily acquired under the provisions of the Land Acquisition Act. The fresh evidence that the Appellants wish to adduce consists of certain documents leading up to and resulting in a compromise of another case with reference to the acquisition of the premises of the British India Steam Navigation Co. which adjoin the premises of the Appellants.

The compromise with the British India Steam Navigation Co. had not been arrived at when the lower Court gave judgment, nor when the appeal was filed in this Court. The present application is opposed by the Secretary of State for India in Council, the Respondent to the present appeal.

Now the powers of an Appellate Court in India to admit further evidence are governed by the provisions of Or. XLI, r. 27, which so far as material is in the following terms:—"(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced or witness to be examined ". The wording of the rule shows clearly that the power of an Appellate Court to admit further evidence is a very restricted one.

In the first place, the rule prohibits the parties to the appeal from producing further evidence.

Next the power of the Court to admit further evidence is only in case the Appellate Court "requires" the additional evidence "to enable it to pronounce judgment or for any other substantial cause".

As has been pointed out, the word "requires" plainly means "needs or finds needful". When therefore can the Appellate Court "require" the additional evidence "to enable it to pronounce judgment or for any other substantial cause"? Manifestly not until the Appellate Court has examined the evidence on the record and comes to the conclusion that the evidence as it stands is inherently defective. Until the Court has therefore examined the record, it is not in a position to say, whether the evidence is inherently defective and that it will require the further evidence to enable it to pronounce judgment or for any other substantial cause. A preliminary application such as the present is not warranted by the terms of Or. XLI, r. 27.

An application to admit fresh evidence discovered out of Court by the parties comes under Or. XLVII, r. 1, not under Or. XLI, r. 27.

It is said that the evidence was not in existence at the date of the trial and the case of *Kotaghiri* v. *Vellambi* (1) was cited to show that such evidence is not admissible by way of review. The point does not arise in the present case and it is not necessary for us to decide whether such view is correct or not.

Or. XLI, r. 27, does not, I think, authorise an Appellate Court to admit fresh evidence, documentary or oral, and whether or not it was in existence at the time of the judgment of the lower Court or at the time the appeal was preferred unless the Appellate Court after examining the evidence on the record comes to the conclusion that it requires the additional evidence in order to enable it to pronounce judgment, namely, that there is a lacuna or defect on the evidence on the record.

This appears to me to be the effect of the decision of the Privy Council in the case of *Kessowji Issur* v. *Great Indian Peninsular Railway Co.* (2). I can find nothing in the judgment of their Lordships to suggest that new evidence, discovered out of Court by the parties but which only came into existence after the filing of the appeal, can be admitted on a preliminary application by the parties to the Appellate Court. Such a suggestion is negatived by the express words in Or. XLI, r. 27, that "the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court".

I think therefore that we have no jurisdiction to assent to the present application. But even if we had such jurisdiction, I should on the materials before us refuse this application. The evidence the Appellant company wish to put forward is to the following effect.

The British India Steam Navigation Co. were the owners of the premises adjoining those of the Appellant company. Both the British India Co. and Appellant company are represented in Calcutta by

(1) 4 C. W. N. 725: s. c. I. L. R. 24 Mad. 1 (1900).

(2) 11 C. W. N. 721: s. c I. L. R. 31 Bom. 381 (1907).

Messrs. Mackinnon Mackenzie & Co. as also in London, although apparently the two companies have different Boards of Directors in London.

On the premises adjoining those of the Appellant company, the British India Co. had a considerable coal business chiefly for the purpose of coaling their extensive fleet. This property of the British India Co. is known as Bracebridge Hall.

The same declaration under the provisions of the Land Acquisition Act was made in respect of the property of the Appellant company, Bracebridge Hall and various other properties.

The British India Co., after the declaration, preferred a claim for a very large amount amounting in the first instance to over one crore and 22 lakhs of rupees.

An award of 11 lakhs odd of rupees was made by the Land Acqusition Collector. The British India Company then required the matter to be taken before the Special Land Acqusition Judge. Negotiations were then opened between Sir Frederic Dumayne on behalf of the Calcutta Port Commissioners on the one hand and in the first instance with Mr. Alexander Mc Laurin Monteath and subsequently Lord Inchcape on behalf of the British India Co., on the other hand. After long and protracted negociations the case of the British India Co. was subsequently settled by a cash payment of 28 lakhs of rupees to the British India Co., and the grant of certain facilities by the Port Commissioners with reference to the coaling of the fleet of the British India Co. It is now alleged that the facilities granted to the British India Co. are more valuable than those enjoyed by them at Bracebridge Hall, and therefore the whole of the 28 lakhs was awarded in respect of the other items of their claim. On this footing, it is said that the Port Commissioners have paid the British India Co. in respect of the site of Bracebridge Hall amount 3 or 4 times larger than the amount paid to the Appellant company, when in fact the land of the Appellant company and Bracebridge Hall must be of substantially the same value. The Appellant company, therefore, desire to give in evidence certain documents relating to the compromise of the claim of the British India Co. Two affidavits have been filed on the present application, one by Mr. Alexander Mc Laurin Monteath in support of the application and the other by Sir Frederic Dumayne in opposition thereto. Sir Frederic Dumayne is the Vice-Chairman and Chief Executive Officer of the Port Commissioners. There is a conflict between the statements contained in the affidavit of Mr. Monteath and those in the affidavit of Sir Frederic Dumayne. Now it appears from the evidence that the negotiations, which led to the settlement with the British India Co., were opened early in January 1911. The negociations no doubt were stated by Sir Frederic Dumayne to be "without prejudice to either side" and "confidential." Mr Sinha on behalf of the Government has argued that this would render all correspondence which passed between the parties thereto incapable in any event of being used in evidence even when a settlement was arrived at. I think Mr. Sinha placed his case too high. The affidavits do establish however that in addition to the correspondence interviews took place in the first instance between Mr. Monteath and Sir Frederic Dumayne with a view to a settlement of the case of the British India Co.

The negotiations in India closed in May 1911.

In June 1911 Sir Frederic Dumayne proceeded to England. It appears from

his affidavit that the Port Commissioners had directed him to see Lord Inchcape with reference to compromising the British India Company's case. He was also authorised to go as far as to make an offer of 25 lakhs of rupees for that purpose. Lord Inchcape and Sir Frederic Dumayne arrived finally at a settlement, *viz.*, that the Port Commissioners should pay to the British India Co. 28 lakhs of rupees and give to the British India Co. certain facilities. Sir Frederic Dumayne has sworn in his affidavit that in the settlement he never contemplated paying 28 lakhs of rupees for the land, structures and machinery of the British India Co., but that he agreed to this sum as a settlement of the whole case.

Lord Inchcape has not made an affidavit as to what took place between himself and Sir Frederic Dumayne. The Port Commissioners sanctioned with reluctance the settlement arrived at between Lord Inchcape and Sir Frederic Dumayne and recommended it to the Government for sanction and approval. The settlement was subsequently approved of by the Government. This, however, was after the present case had been decided by the Special Judge and the present appeal filed.

Much stress had been laid by the Appellants on the proceedings of the Special Land Acquisition Committee of the Port Commissioners of the 20th October 1911. No doubt the record of the proceedings is not very happily worded, but I cannot imagine that a public body like the Port Commissioners intended to pay the British India Co. for their land a sum so vastly in excess of what they were paying to other parties and which would in the end result in their having to pay excessive sums for other lands acquired by them. For if this 28 lakhs was in fact paid only for the land, structures and machinery, this fact would be used in subsequent cases against the Port Commissioners as to the value of the lands acquired by them.

Sir Frederic Dumayne has sworn that he was fully cognisant of the prices paid by the Port Commissioners on other acquisitions and that what he wanted to settle was the whole case against the Commissioners.

The total claim preferred by the British India Co. amounted to Rs. 1,22,10,786-11-10. A large number of the items in the claim would appear to be altogether untenable. One of the items in the claim was a sum of Rs. 37,01,910 "for loss of time." This item was claimed for the difference between the time it would take to bring the vessels of the British India Co. alongside at Bracebridge Hall and that required to take them into the Docks of the Commissioners.

It is difficult to imagine on what principle such a claim could be supported. The Port Commissioners were however in this difficulty that the Collector had allowed the sum of Rs. 1,27,140-10-0 in respect of this item and so had admitted the claim in principle. The Court under the provisions of the Land Acquisition Act has no jurisdiction to reduce the amount awarded by the Collector and it may perhaps be doubted whether the Court has jurisdiction to re-allot over the different items of claim the aggregate amount allowed by the Collector. All the probabilities therefore suggested that the story told by Sir Frederic Dumayne in his affidavit that what he settled with Lord Inchcape was the whole case between the British India Co. and the Port Commissioners and that the sum of 28 lakhs of rupees was not paid to British India

Co. in respect of the land, machinery and structures only, is correct. The only person who could have contradicted Sir Frederic Dumayne as to the terms arrived at in London between Lord Inchcape and himself would be Lord Inchcape. If therefore we were to decide to permit the Appellant company to adduce further evidence it would have to be the evidence of Lord Inchcape as to what were the terms of settlement between himself and Sir Frederic Dumayne. In that event such evidence would have to be tested in the ordinary manner by cross-examination.

The letters that passed between Lord Inchcape and Sir Frederic Dumayne, dated the 26th of January and the 13th of February 1912, suggest that Lord Inchcape did not consider that the sum of Rs. 28 lakhs had been paid to the British India Co. in respect Bracebridge Hall and the structures and machinery thereon.

The statements in Sir Frederic Dumayne's affidavit appear to me to agree with all the probabilities of the case and are uncontradicted as to what was intended to be settled between him and Lord Inchcape. Even therefore if we have jurisdiction to admit this further evidence on the materials before us, I should refuse the Appellant company leave to do so.

The present application is therefore dismissed with costs which we assess at 10 gold mohurs.

RICHARDSON, J.—I entirely agree with Mr. Justice Fletcher, whose judgment I have had advantage of reading, that the application before us is not one which we have jurisdiction to entertain under Or. XLI, r. 27. And I will only add this that even if we had a power, co-extensive with the power of the Trial Court under Or. XLVII to admit fresh evidence by way of review, I am not of opinion that the evidence tendered is evidence which ought to be admitted in the exercise of any such power. It is not evidence, the bearing of which on the issue which has to be determined is practically beyond the sphere of controversy or in any sense conclusive. On the contrary it is only necessary to read the affidavit on the one side and the counter-affidavit on the other to show that matter is raised of a controversial and argumentative character. The question at issue is the market value of certain land at a certain date. The agreement which it is sought to put in (together with letters and other documents leading up to it) was arrived at in another case between parties one of whom is not a party to the present case and it was arrived at after the trial of the present case was concluded. By itself the agreement is of no use to the Appellant company. It only shows that a lump sum was paid to the British India Co. in respect of the compulsory acquisition of their land and that in the same respect certain facilities were also promised to them by the Port Commissioners in connection with their coal tract. The land, it is true, adjoins the land of the Appellant company. But the compensation which the British India Co. had claimed from the Collector was arranged under different heads many of which had nothing to do with the value of the land. Two or three items were withdrawn while the case was before the Collector, but the total claim which was subsequently carried before the Special Land Acquisition Judge was still very large. That claim was satisfied by the lump sum and the coaling facilities. Then comes the point—how much of the money payment is to be allocated to the land? That depends on the further question—what was the value

assigned to the facilities? Both these questions are in serious dispute, each side endeavouring to fasten upon the other its own interpretation of the agreement. As might have been expected, when such questions are debated between practical buisness-men, there is a good deal to be said; at any rate a good deal was said—on both sides. The difficulty of arriving at a decision as to what was paid for the land is not diminished by the reflection that it is not the actual value of the land and the actual value of the facilities that has to be considered, but what was in the minds of the parties to the agreement. What the Appellant company is really trying to do is to fix upon the Port Commissioners an admission as to the value of the land acquired from the British India Co., and I merely add that for that purpose the value which the Port Commissioners attributed to the land (as to which Sir Frederic Dumayne's affidavit is entitled to the greatest weight) is more important than the value which the British India Co. may have attributed to the land. But to my mind the doubts and difficulties which surround the evidence tendered is not only no recommendation, but is a complete bar, to its reception at this stage, even, as I have said, if we had a power to receive fresh evidence such as that conferred on the Trial Court by Or. XLVII.

Application refused.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1284 OF 1911.

MOOKERJEE, J. BEACHCROFT, J. 1913, 12, March.	DAKHYANI DASSI, Plaintiff, Appellant, *v.* MONO RAUT and others, Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 105A—Settlement of jungle and waste land for reclamation—Co-sharer landlord managing estate—Occupation and reclamation by lessee acquiesced in by all the co-sharers—Subsequent refusal by some after partition to accept lessee as tenant in respect of their particular shares—Status acquired by lessee—Lessee if entitled to have fair rent assessed.

The Plaintiff sued to have fair rent settled in respect of land held by him. The land in suit was originally included in a village which belonged to one B and his co-sharers, and was partly jungle and partly waste. B took possession of the land without any protest by his co-sharers and in the ordinary course of management of the estate settled the land with the Plaintiff. Subsequently there was a partition amongst the co-sharers, and some of them accepted rent from the Plaintiff while two of them refused to do so. So far as the lands allotted to their shares were concerned, there was no suggestion that the Plaintiff came into occupation of the land against the will of the co-sharers of B, who on the other hand acquiesced in the occupation by the Plaintiff and in the reclamation of the land by her at considerable cost for a number of years.

Held—*That the position of the Plaintiff was not worse than what it would have been if he had in good faith accepted settlement from a trespasser in actual occupation of the land in which event even he would have attained the status of a raiyat.*

That the Plaintiff was entitled to have fair rent assessed in respect of the land held by him.

WATSON v. RAM CHUND (1), BINOD LAL v. KALU (2) AND RADHA PROSHAD v. ESUP (4), *referred to.*

This was an appeal preferred on the 24th May 1911 against a decree of Mr.

(1) I. L. R. 18 Cal. 10 (1890).
(2) I. L. R. 20 Cal. 708 (1893).
(4) I. L. R. 7 Cal. 414 (1881).

DAKHYANI DASSI *v.* MONO RAUT.

L. C. Adami, Special Judge of Zilla Cuttack, dated 8th February 1911, affirming a decree of Babu B. K. Adhikari, Assistant Settlement Officer of Balasore, dated the 4th November 1910.

The facts of the case will appear from the judgment.

Babu Debendra Nath Ghosh for the Appellant.

Babu Susil Madhab Mullik (for *Babu Provash Ch. Mitter*) for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiff in a proceeding under sec. 105A of the Bengal Tenancy Act for settlement of fair rent. The application was refused by the Court of first instance and that order has been affirmed on appeal by the Special Judge. The facts are not in controversy and may be briefly recited. The area in respect of which the Plaintiff claims to be the tenant under the Defendants and to have fair rent assessed was originally included in a village owned by one Bykuntha Nath Kar and several other persons. On the 27th March 1900, Bykuntha Nath Kar granted an *amalnama* in favour of the Plaintiff which covered amongst other lands an area of 8 acres. It was stated that the land was partly jungle and partly waste and that it was necessary to settle it with the grantee for the purposes of reclamation and improvement. The land was joint property, but no objection was apparently taken by any of the co-sharers of the grantor of the settlement made by him. The grantee entered into occupation and has reclaimed the land. Shortly after the settlement, a partition suit was commenced amongst the proprietors. During the pendency of this suit at one stage it seemed that the land now in dispute might fall to the share of one of the proprietors (Kashinath Kar). The Appellant in 1906 in order to protect her right took a lease from Kashinath. But ultimately when partition was completed in 1908, it was found that 58 acres fell into the share of Kashinath and other proprietors with whom we are not at present concerned and 26 acres fell into the share of the present Defendants-Respondents. In the settlement proceeding the Plaintiff was recorded as the tenant in respect of the entire area. In so far as Kashinath and his co-sharers are concerned, there has been no difficulty as they have accepted the Plaintiff as their tenant. But in so far as the Respondents are concerned, they have refused to treat the Plaintiff as their tenant, and when the present proceeding was commenced by the Plaintiff for ascertainment of fair rent payable by her, the Defendants took exception on the ground that she was not their tenant and no rent could be assessed in respect of the land with regard to which the relationship of landlord and tenant did not subsist between the parties. The Courts below have concurrently held that the Plaintiff is not the tenant of the Defendants in respect of this land and is consequently not entitled to have fair rent assessed. In our opinion, this view cannot possibly be maintained.

On behalf of the Defendants, it has been contended that the lease from Kashinath Kar granted in 1906 superseded the *amalnama* and that the lease itself was inoperative, because it was granted during the pendency of the partition suit. There is clearly no force in this contention. The lease was never intended to supersede the *amalnama*, if it should turn out in the end that the lease itself was an invalid document. The Appellant obviously intended to strengthen her position and to protect herself from the attack of the co-sharers other than Bykuntha Nath Kar,

DAKHYANI DASSI *v.* MONO RAUT.

into whose hands the superior interest might pass. It has not been disputed that effect cannot be given to this lease as it was executed during the pendency of the partition suit. The Plaintiff is accordingly entitled to fall back upon the *amalnama.* The question therefore arises, what were her rights under the *amalnama.* On behalf of the Defendants, it has been argued that it created title in her only to the extent of the interest of Bykuntha Nath Kar. We are of opinion that this contention is entirely unfounded. No doubt, he was one of the co-sharer landlords. The land however was waste and uncultivated. He had taken possession of the land apparently without any protest by his co-sharers and in the ordinary course of management of the estate he settled the land with the Plaintiff for the purpose of reclamation. That this was a prudent act of management cannot be disputed and that view is confirmed by the circumstance that, for a period of more than ten years, not one amongst the co-sharers of Bykuntha Nath made any attempt to repudiate his action. Under these circumstances the principle of the decision of the Judicial Committee in the case of *Watson* v. *Ram Chund* (1) clearly applies. As their Lordships observed, in India a large proportion of the lands including very many large estates is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross-injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted or until a partition by metes and bounds can be effected—a work which in ordinary course in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle and greatly deteriorate in value. It is further clear that the position of the Plaintiff is not worse than what it would have been, if she had in good faith accepted settlement from a trespasser in actual occupation of the land. In that event it is clear that she would have attained the status of a raiyat [*Binod Lal* v. *Kalu* (2) and *Mohima Chundra* v. *Hazari Pramanik* (3)]. Reliance, however, has been placed on behalf of the Defendants upon the case of *Radha Proshad* v. *Esup* (4), which is clearly distinguishable. In the first place, that was not the case of agricultural land. In the second place, Sir Richard Garth, C. J., laid down that when a tenant had been put into possession of joint property with the consent of all the co-sharers, no one or more of the co-sharers can turn the tenant out and without the consent of the others. But no man has a right to intrude upon the joint property against the will of the co-sharers or of any of them; if he does so, he may be ejected without notice either altogether, if all the co-sharers join in the suit, or partially if only some of the co-sharers wish to eject him. In the case before us, there is no suggestion that the Plaintiff came into occupation of this land against the will of the co-sharer of Bykuntha Nath Kar. On the other hand, they acquiesced in the occupation of the Plaintiff and in the reclamation of the land by her at considerable cost for a number of years, and it is only when the land has been reclaimed that two of the co-sharers turn round and contend that the Plaintiff has not attained the status of a tenant in so far as the lands allotted to

(1) I. L. R. 18 Cal. 10 (1890).

(2) I. L. R. 20 Cal 708 (1893).

(3) I. L. R. 17 Cal. 45 (1889).

(4) I. L. R 7 Cal. 414 (1881).

their shares are concerned. We are of opinion that this contention is wholly unjust and cannot be allowed to prevail.

The result therefore is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to the Court of first instance in order that fair rent may be assessed in respect of this land. The Plaintiff is entitled to pay costs throughout this litigation. We assess the hearing fee in this Court at two gold mohurs.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 3931 OF 1910.

N. R. CHATTERJEA, J.
WALMSLEY, J.
1913,
Heard, 16, July.
Judgment,
26, August.

MAHESHRI PROSHAD SINGH & ors., Plaintiffs, Appellants,
v.
BAIJ NATH HAZARI and ors., Defendants, Respondents.

Malikana—Interest in immoveable property—Money charged on immoveable property—Limitation Act (XIV of 1859), sec. 12, (IX of 1871), Art. 132, Sch. II—Right not exercised for more than 12 years before Act IX of 1871 came into operation—Right is barred.

Under Act XIV of 1859, malikana *was an interest in immoveable property and governed by Act XIV of 1859, sec. 12, and would be barred if there had been no enjoyment of the* malikana *for a period of 12 years.*

BHOALEE SINGH *v.* NEEMOO BEHOO (1), GOBIND CHUNDER ROY CHOUDHARY *v.* RAM CHUNDER CHOUDHARY (2) AND HEERRANUND SHOO *v.* OZEERUN (3), *followed.*

Where therefore the right to malikana *was established by decree of Court in 1855 but the right was not enjoyed for more than 12 years before Act IX of 1871 came into force, the right was extinguished under Act XIV of 1859 and could not be revived by any subsequent statute of limitation.*

CHHAGAN LAL *v.* BAPUBHAI (5), *distinguished.*

(1) 12 W. R 498 (1869).
(2) 19 W. R. 94 (1873).
(3) 9 W. R. 102 (1868).

This was an appeal preferred on the 3rd December 1910 against a decree of Mr. F. W. Ward, District Judge of Zilla Muzaffarpur, dated the 26th August 1910, affirming a decree of Babu Pankaja Kumar Chatterjee, Sub-Judge of that district, dated the 6th April 1909.

The material facts will appear from the judgment.

Babu Luchmi Narain Singh for the Appellants.

Babu Sarashi Charan Mitter for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for recovery of arrears of *malikana* for the years 1303 to 1314. The Courts below have concurred in holding that the suit was barred by limitation, and the Plaintiffs have appealed to this Court.

It appears that the Plaintiffs obtained a decree establishing their right to the *malikana* so far back as 24th December 1855, but it is found that the Plaintiffs never received any *malikana* since that date, and their attempt to prove payments between 1855 and 1895 failed. The question is whether under these circumstances the claim is barred by limitation.

Now under Art. 132, Sch. II of Act IX of 1871, the period of limitation for a suit for money charged upon immoveable property was 12 years from the time when the money sued for became due, and it

(5) I. L. R. 5 Bom. 68 (1880)

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was expressly provided that *malikana* shall for the purposes of that article be deemed to be money charged upon immoveable property, and similar provision is contained in the later Limitation Acts. But under Act XIV of 1859, it was held in a series of cases that *malikana* was an interest in immoveable property and not rent, and consequently governed in the matter of limitation by sec. 12 of Act XIV of 1859 [see *Bhoalee Singh* v. *Neemoo Behoo* (1), *Gobind Chunder Roy Choudhary* v. *Ram Chunder Choudhary* (2) and the cases cited therein] and that if there had been no enjoyment of *malikana* for a period of 12 years, the right to sue for money recoverable on account of it was barred. [See *Heerranund Shoo* v. *Ozeerun* (3)] The right to the *malikana* in the present case was no doubt established in 1855. But since that date and before Act IX of 1871 came into force, the Plaintiffs were for a period of more than 12 years not in enjoyment of it. The effect of the decree of 1855 was that Plaintiffs' right to an interest in immoveable property was established, but they lost that right by reason of not being in possession and enjoyment of that right for a period of 12 years. The analogy of a landlord's claim for recovery of arrears of rent, which is not barred, even though no rent may have been realised within 12 years, where the relationship of landlord and tenant subsists or is established by a decree of Court, cannot apply to the present case. As pointed out by Markby, J., in *Beebee Chummun* v. *Om Koolsoom* (4), the zamindar does not lose his right as against his raiyat, although he does not for a number of years choose to assert them, because a raiyat stands in a totally different position from an ordinary person as to gaining a title against the zamindar. He derives his right to possess from the zamindar, and in a measure represents and protects the title of his zamindar. But the position of the parties here is in no way similar to that of landlord and tenant.

It was contended that the Plaintiffs' right having been established, they ought to have been held entitled to succeed until it was found that the Defendants or their predecessors had set up a title adverse to the Plaintiffs' after the decree of 1855. But the Defendants' predecessors having appropriated the entire profits to themselves for a period of 12 years, notwithstanding the decree of 1855, the Plaintiffs were out of possession for 12 years and their right was accordingly barred. The fact therefore that the Plaintiffs' right was established in 1855 does not help the Plaintiffs.

In the case of *Chhagan Lal* v. *Bapubhai* (5), it was held that where a Plaintiff has already obtained a decree declaring his title, it is not necessary for him to establish his periodically recurring right against any person who is bound by that decree, and that this being so, there is nothing in the Law of Limitation which can be construed into a restriction of the Plaintiffs' right to recover the arrears falling due within the period of limitation. In that case, however, the decree establishing the Plaintiffs' right was made in 1869, and Act IX of 1871 came into force before 12 years had run out from that date. The claim was for the recovery of a share of the income of a certain *vatan* connected with an hereditary office, but was not strictly speaking a charge upon immoveable property, and the ground upon which the decision proceeded was that the right was a periodically recurring right. But under Act XIV of 1859

(1) 12 W. R. 498 (1869).
(2) 19 W. R. 94 (1873).
(3) 9 W. R. 102 (1868)
(4) 13 W. R. 465 (1870).
(5) I. L. R. 5 Bom. 68 (1880).

malikana was held to be an interest in immoveable property and not like rent a periodically recurring right. The case is therefore clearly distinguishable.

The Plaintiffs have been found to have never received any *malikana* since 1855, *i.e.*, for more than half a century, and their right was barred under Act XIV of 1859. We are accordingly of opinion that the decrees of the Courts below are correct and the appeal must be dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1152 OF 1911.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
11, March.

ASHU TOSH SINGHA RAY and others, Plaintiffs, Appellants,
v.
BANOMALI SAIN, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 85 (2), 160, 161 (c), 167—Permanent under-raiyati lease, registered—Landlord o occupancy holding purchasing holding if bound to annul it as incumbrance or protected interest.

An under-raiyati lease registered in contravention of sec. 85, sub-sec. (2), of the Bengal Tenancy Act, is not operative against the superior landlord of the occupancy raiyat.

JARIP KHAN *v.* DORFA BEWA (1) AND MANIK BORAI *v.* BANI CH. MANDAL (2), *referred to.*

The landlord of the occupancy holding purchasing that holding at a sale for its arrears cannot be called upon to annul a permanent under-raiyati lease created without his consent as an incumbrance within the meaning of cl. (a) *of sec. 161, of the Bengal Tenancy Act, nor is such an interest a "protected interest" within sec. 161, cl.* (c), *of the Act, so far as the landlord auction-purchaser of the occupancy holding is concerned.*

This was an appeal preferred on the 11th May 1911 against a decree of Babu Bankim Chandra Mitra, Subordinate Judge of Zilla Burdwan, dated 9th February 1911, modifying the decree of Babu Purna Chandra Bose, Munsif of Kalna, dated the 6th December 1909.

The material facts will appear from the judgment.

Babu Dwarka Nath Chuckerbutty (for *Babu Jogesh Chandra Ray*) and *Babu Sitaram Banerjee* for the Appellants.

Babu Sajani Kanta Singha for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal on behalf of the Plaintiffs in an action in ejectment. The land in dispute was originally held under the Plaintiffs by one Bhuban Mandal, who came into occupation in 1883. On the 2nd October 1888, Bhuban Mandal executed a permanent sub-lease in favour of the Defendant, whose occupation of the land had commenced from some time before. This lease was granted on the assumption that Bhuban Mandal was a tenure-holder. The document was consequently registered without objection. The property ultimately devolved on one Bhabini Dasi who made default in payment of rent to the Plaintiffs. The latter, as the superior landlords, thereupon obtained a decree for arrears of rent, and in execution thereof the tenancy was brought to sale and purchased by the Plaintiffs themselves on the 14th February 1907. The sale was confirmed on the 21st March following and symbolical possession was delivered to the

(1) 17 C. W. N. 59 (1912).
(2) 13 C. L. J. 649 (1910).

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Plaintiffs as purchasers on the 8th June 1907. The Plaintiffs were, however, unable to obtain actual possession, as the Defendant was in occupation. They thereupon caused a notice to be served upon him as required by sec. 167 of the Bengal Tenancy Act. Notwithstanding the service of notice, the Defendant refused to vacate the land. The Plaintiffs thereupon commenced this suit on the 12th March 1909, to eject the Defendant on the ground that his interest, if any, had been validly terminated, and he was consequently liable to be ejected as a trespasser. The Court of first instance decreed the suit. Upon appeal that decree has been reversed by the Subordinate Judge. The Courts below have concurrently found that the tenancy held by Bhuban Mandal constituted an occupancy holding. It is clear therefore that the sub-lease granted by Bhuban Mandal to the Defendant on the 2nd October 1888 should not have been admitted to registration in view of the provisions of sub-sec. (2), of sec. 85, of the Bengal Tenancy Act. In fact, as the instrument purported to be a permanent sub-lease, it would not have been admitted to registration but for the fact that the land demised was described as comprised in a permanent tenure. It follows accordingly that the sub-lease so registered in contravention of the statute is not operative. This view is supported by the decision in *Jarip Khan* v. *Dorfa Bewa* (1). It is plain that the question which was raised in the case of *Manik Borai* v. *Bani Ch. Mandal* (2), namely, whether a sub-lease registered in contravention of the statute is operative as between the lessor and the lessee, does not consequently arise in the present case. Judicial opinion is unanimous to the effect that a sub-lease registered in contravention of the provisions of sec. 85, sub-sec. (2), of the Bengal Tenancy Act, is not operative against the superior landlord of the occupancy raiyat. We must therefore determine the rights of the parties on the footing that the Defendant did not acquire any title under the sub-lease of the 2nd October 1888.

As already stated he was in occupation from before the 2nd October 1888: his status, from the commencement of his tenancy, was accordingly that of an under-raiyat. The question is, whether he has a sub-tenancy which is required to be annulled by the purchaser under cl. (*a*), of sec. 161, of the Bengal Tenancy Act. Now section 159 provides that when a holding is sold in execution of a decree for arrears of rent due in respect thereof, the purchaser shall take it subject to the interests defined as protected interests, but with power to annul those defined as encumbrances. It is argued on behalf of the Defendant that he has an interest which falls within the description of protected interest as also of an encumbrance. This contention requires consideration, because the Courts below have found that the notice under sec. 167 of the Bengal Tenancy Act was not served upon the Defendant in accordance with law. If the notice had been served upon him, it would have become needless to consider, whether he held a sub-tenancy which had to be annulled as an encumbrance within the meaning of sec. 161: but it would have been necessary to determine whether he had a protected interest within the meaning of sec. 160.

Now in so far as sec. 161 is concerned, the case for the Defendant is that he is an under-raiyat, independently of the invalid sub-lease of the 2nd October 1888, and that he has consequently a sub-tenancy

(1) 17 C. W. N. 59 (1912).
(2) 13 C. L. J. 649 (1910).

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within the meaning of sec. 161, cl. (*a*). It may be conceded that the term "any sub-tenancy" is, by itself, comprehensive enough to include the interest of an under-raiyat. But the question arises, whether there is a sub-tenancy in so far as the Plaintiffs are concerned, because the Plaintiffs are not only purchasers at the sale in execution of the decree for arrears of rent, they are also the superior landlords in respect of the occupancy holding which was brought to sale. Sec. 85, sub-sec. (*1*), provides that if a raiyat sublets, otherwise than by a registered instrument, the sub-lease shall not be valid as against the landlord, unless made with his consent. It has not yet been investigated, whether the Plaintiffs as landlords of the occupancy holdings consented to the grant of the sub-lease to the Defendant as an under-raiyat. But we shall assume, for the purposes of argument, that such consent was not given. If, then, the Defendant was inducted upon the land as an under-raiyat without the consent of the landlords of the occupancy-raiyat, it is plain that there is no sub-lease in his favour which is valid against the superior landlords. Consequently he does not hold any sub-tenancy which may be treated as an incumbrance within the meaning of cl. (*a*) of sec. 161 as against the landlord auction-purchaser. The landlord auction-purchaser cannot, accordingly, be called upon to annul this sub-tenancy as an encumbrance. The view we take is in accord with that taken by this Court in the case of *Peary Mohan* v. *Badal Chandra* (3). We do not pronounce any opinion upon a question which may hereafter arise, namely, as to the precise position of a stranger who purchases at a sale held in execution of a decree for arrears of rent. As regards the case now before us, it is sufficient to observe that sec. 161 clearly is of no assistance to the Defendants, if it is assumed that his interest as under-raiyat was created without the consent of the landlord.

In so far as sec. 160 is concerned, reliance is placed by the Defendant on cl. (*c*) by which protection is afforded to any lease of land whereon dwelling houses, manufactories or other permanent buildings have been erected or permanent gardens, plantations, tanks, canals, places of worship or burning or burying grounds have been made. Here, again, precisely the same question arises as in the case of sec. 161. It cannot be reasonably contended that the Defendant has a lease of land within the meaning of cl. (*c*), sec. 160, when as against the Plaintiffs such lease is not valid, because not shown to have been made with their consent. Here, too, we reserve the question which may possibly hereafter arise as to the position of a stranger purchaser. But it is obvious that sec. 160 also is of no assistance to the Defendant.

It finally becomes necessary to determine whether sub-sec. (*1*) of sec. 85 applies to this case. The Courts below have not determined whether the land was sublet to the Defendant with the consent of the superior landlords of the occupancy raiyat. The determination of that question was unnecessary in view of the frame of the suit. The Plaintiffs as already explained sought to eject the Defendant on the ground that his interest had been annulled in accordance with the provisions of sec. 167 of the Bengal Tenancy Act. That case has failed. Consequently the point just mentioned must be investigated. The learned Vakil for the Defendant has also contended that even if cl. (*c*) of sec. 160 be held inapplicable, the Defendant may still be able to establish that the

(3) I. L. R. 28 Cal. 205 (1900).

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Plaintiffs are estopped, by reason of their conduct, from seeking relief by way of ejectment, and he has explained that the question of estoppel was not pointedly raised in view of the frame of the suit. We are of opinion that in these circumstances, the question of estoppel should be investigated.

The result is that this appeal is allowed, the decrees of the Courts below set aside and the case remanded to the Court of first instance in order that the Court may determine upon evidence to be adduced by the parties the following questions; namely, *first*, whether the Defendant was granted a tenancy as an under-raiyat with the consent of the landlord of his grantor, the occupancy-raiyat; and, *secondly*, whether the claim for ejectment is barred by the doctrine of estoppel. If it is found upon the first question that the sub-lease to the Defendant was granted with the consent of the Plaintiffs or their predecessors, or, if it is found upon the second question that the Plaintiffs are estopped by reason of their conduct, the suit will stand dismissed. If both the questions are decided against the Defendant the suit will stand decreed. Each party will pay his own costs in all the Courts up to the present stage.

Case remanded.

[CIVIL REFERENCE.]

REF. No. 9 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
29, May.

BANDE ALI FAKIR and others, Plaintiffs,
v.
AMUD SARKAR and ors., Defendants.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. (8)—Grant of forest rights—Suit for rent by grantor if may be entertained by Small Cause Court—" Rent," what is—Bengal Tenancy Act (VIII of 1885), secs. 144, 193.

A grant under which the grantee becomes entitled to cut and remove during a specified period trees which might during that period attain a prescribed size (whether it creates an interest in land or not) is a grant of forest rights within the meaning of sec. 193 of the Bengal Tenancy Act. The transaction cannot be regarded as a sale of timber, and the consideration payable for such rights is rent within the meaning of the term as used in cl. (8) *of Sch. II of the Provincial Small Cause Courts Act.*

Such a suit cannot be entertained by a Small Cause Court, and should be instituted under sec. 144 of the Bengal Tenancy Act in the Court which would have jurisdiction to entertain a suit for the possession of the trees.

This was a reference by M. Smither, Esq., District Judge, Dacca, dated 29th July 1913.

The reference was in the following terms:—

"I have the honour to forward, under Or. 16, r. 7, of Act V of 1908, the following reference, with the record:—

"(1) The Applicant seeks to recover Rs. 326-1-10 said to be due under a '*se-dar patta*', or 'lease under a sub-lease', under which the grantee is entitled to cut and remove trees of a certain size, and some kinds of trees excepted, during a certain period, from a certain area. The Applicant presented his plaint in the Court of the Fifth Munsif, Dacca; but the Munsif by his order, dated the 1st July 1913, returned it—'to be filed in the proper Court'. The Applicant then presented his plaint in the Small Cause Court having jurisdiction between Rs. 100 and Rs. 500; but on 8th July 1913 that Court also returned the plaint as not of a suit maintainable in the Small Cause Court.

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"(2) It is apparent that one of the two Courts has failed to exercise a jurisdiction vested in it by law, within the meaning of Or. 16, r. 7, and that the Applicant being denied a hearing is entitled to have the matter referred to the High Court.

"(3) Neither Court recorded any reasons for holding that it had no jurisdiction, and that the plaint should be returned to go to another Court. Under cl. (8), Sch. II, Act IX of 1887, suits for rent, other than house rent, are excluded from the jurisdiction of the Small Cause Court. The Act does not define rent and the definition in the Bengal Tenancy Act, which is for the purposes of that Act, does not seem to be of use to shew what is meant by 'rent' in Act IX of 1887. For, in this Act, the word is used in a wider sense than in the Tenancy Act. In Act IX of 1887, it is taken that 'rent' includes 'house-rent'; for 'house-rent' has to be specially excepted. But the definition in the Tenancy Act will not, I think, cover house-rent: for in the case of a house, owned by a landlord, and let to a tenant, the value of the house is often many times greater than the value of the land on which it stands, and the tenant is paying principally for the use of the house itself, not the land. A very large part of what he pays is for the use of the house and none of this will come under the definition.

"(4) In a case reported in the *Calcutta Law Journal*, Vol. VII, p. 152, it was held that money payable in respect of a grant of the right to cut trees of a certain size, etc., over a certain area, was not 'rent' within the meaning of the definition in the Tenancy Act; but this leaves undecided the question whether it is rent in the wider sense of the word as used in Act IX of 1887. The use of the expressions 'lease' and 'sub-lease' indicates that the transaction was regarded as one of letting for rent, rather than of sale, or any other kind of transfer: and it is difficult to distinguish the transaction, in any essential, from one in which rights in fruits only, or even to crops only, are granted. Trees may grow quickly or slowly, according to weather conditions, and healthiness and freedom from pests, in the same way as fruits and crops. It is not a case of sale of so much timber, transferring ownership in the timber. The grantee gets the right to cut and take away trees of certain kinds, if they grew to a certain size, within the time limit of his grant. One of the most important uses of a forest is to grow trees, to be felled and removed for timber. The felling and removal of trees from a forest is not the destruction, or using up, of the forest, but the proper using of it, if properly restricted: and as the grant is of the use only, the corpus not to be used up, or depreciated, I think the transaction should be regarded as one between a lessor and a lessee, for rent, though not rent within the meaning of the Tenancy Act definition. This is in accordance, I think, with general usage. Such a transaction is regarded as one of letting, for a rent. I felt some doubt whether the fact that the term is only one year four months odd should be held to shew that the transaction was rather a sale of certain trees, than the letting of the use, under restrictions, of the forest. But it seems to be of the latter character.

"(5) In considering the meaning of the word 'rent' in Act IX of 1887, I have not made any distinction between a grantee immediately under a landlord, and a grantee under a grantee, or sub-grantee; but have regarded only what it is that is paid for, whether it is the use of the forest, or only certain property, or articles—trees. What the actual occupier of a house pays for the use of the house, must, I think, be

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regarded as rent, however many persons may stand between the person to whom he pays and the landlord.

"(6) The questions as to differences arising according as the lessor is the landlord himself, or a lessee or sub-lessee under the landlord, arise from the definitions in the Tenancy Act; but in ordinary usage rent is spoken of without regard to such differences.

"(7) I refer the case to the High Court, and recommend that the Munsif be directed to entertain the suit as a suit for rent other than house-rent."

The JUDGMENT OF THE COURT was as follows:—

This is a reference by the District Judge of Dacca under r. 7 of Or. 46 of the Civil Procedure Code, 1908. The Petitioner instituted a suit in the Court of the Munsif at Dacca for recovery of a sum of Rs. 326-4-10 from the Defendants on the basis of what is called a *se-dar-patta*, that is, a lease under a sub-lease. The Munsif held that the suit was cognizable by a Court of Small Causes, and on the 1st July 1913 returned the plaint for presentation in the proper Court. The plaint was then presented in the Small Cause Court at Dacca, but the Judge returned the plaint on the 8th July 1913, because the suit, in his opinion, was not maintainable in the Small Cause Court. The District Judge has, accordingly, upon the application of the Plaintiffs referred the question to this Court, whether the suit is maintainable in the ordinary Civil Court or in the Small Cause Court; he has expressed the opinion, that the view of the Small Cause Court Judge as to the nature of the suit is erroneous.

On the 23rd March 1911, the Defendants executed a *kabuliyat* in favour of the Plaintiffs in respect of forest rights in a tract of land described by boundaries at the foot of the document. The *kabuliyat* states that for a period of one year, four months and twenty-one days, from the 23rd March 1911 to the 15th August 1912, the executants would have the right to cut and take out of the forest all the *gajari* trees and all wild trees (with the exception of mango, jack-fruit, *tal*, *bel*, tamarind and *simul* trees) in close proximity thereto, of a circumference of more than 18 inches and one cubit above the ground, on the tract within the boundaries mentioned. The consideration for this sub-lease was specified to be Rs. 450, out of which Rs. 150 was paid in cash, and the balance was made payable in two equal instalments on the 17th September and 16th November 1911. The Plaintiffs allege that the Defendants have exercised acts of possession under the sub-lease, and have felled and sold the forest trees, but have withheld payment of the rent, except a sum of Rs. 97 paid in two instalments. The Plaintiffs seek to recover the balance with interest and costs. The question arises, whether the suit is in essence one for damages for breach of contract maintainable in a Court of Small Causes, or whether it is a suit for rent entertainable only by the ordinary Civil Court.

Sec. 193 of the Bengal Tenancy Act provides that the provisions of the Act applicable to suits for the recovery of arrears of rent shall, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of any rights of pasturage, forest rights, rights over fisheries and the like. It is plain that the view most favourable to the Defendants is that the document executed by them, and called a *kabuliyat*, does not create in their favour any interest in the land on which the forest stands. But it cannot be

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disputed that it creates in their favour forest rights within the meaning of sec. 193. The transaction cannot rightly be regarded as a sale of timber; the trees were not and could not be specified, as the grantees were clearly entitled to fell timber which might attain the prescribed size at any time within the period during which the rights conferred on them were to be in force. It is further clear that what the Plaintiffs now seek to recover was payable in respect of the forest rights conferred by them on the Defendants. This view is supported by the decision of this Court in *Abdul-Ullah* v. *Asraf Ali* (1). It follows consequently that the provisions of the Bengal Tenancy Act, applicable to suits for the recovery of arrears of rent, apply, as far as may be, to the present suit for the recovery of money payable in respect of forest rights. Consequently under sec. 144, sub-sec. 1, the cause of action must be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the trees. This view, it may be conceded, is open to the criticism that the language of sec. 144 is possibly unduly strained to enable us to reach the conclusion. But it is supported by the judgment of Banerjee, J., in *Shibu Haldar* v. *Gupi Sundari* (2) where sec. 144 was held to apply to a case of fishery right; and this was followed, though not without some hesitation, in *Abdul-Ullah* v. *Asraf Ali* (1) [see also *Shib Prosad* v. *Vakai Pali* (3)]. The question finally arises whether the suit is one for the recovery of rent other than house-rent within the meaning of cl. (8) of the Second Schedule to the Provincial Small Cause Courts Act; because unless excepted from the cognizance of a Court of Small Causes, the suit must be tried by such Court under sub-sec. (2) of sec. 15. Now the term "rent" is not defined in the Small Cause Courts Act, nor is any definition given in the General Clauses Act. The definition given in sec. 105 of the Transfer of Property Act or in sec. 3, cl. 5, of the Bengal Tenancy Act is of no assistance, because each of such definitions was framed for the purposes of a special statute. When we turn to law lexicons, we find a variety of definitions given. Sweet refers to Co. Litt. (142 a) and defines rent as a periodical payment due by a tenant of land or other corporeal hereditament, which is usually payable in money but may also be reserved in fowls, wheat, spurs or the like. Wharton defines it as a certain profit issuing yearly out of lands and tenements corporeal, and adds that it must issue out of the thing granted and not be part of the land or the thing itself. Bouvier defines rent as a certain profit in money, provisions, chattels or labour, issuing out of lands and tenements, in retribution for the use, and is thus distinguishable from purchase-money. [*Barrs* v. *Lea* (4).] Anderson defines rent as a compensation or return in the nature of an acknowledgment given for the possession of some corporeal inheritance. In Bacon's Abridgment, Tit-Rent, reference is made to Co. Litt. (47 a, 142 a), and it is laid down as a general rule that no rent can issue out of any incorporeal inheritance which lies in grant, because they are such things in their nature as a man can never recur to for a distress. To this is added the illustration that lease of the vesture or herbage of land, reserving rent, is good, because the lessor may come upon the land to distrain the lessee's beasts feeding thereon. It is not necessary, however, to treat distress

(1) 7 C. L. J. 152 (1907).
(2) I. L. R. 24 Cal. 449 (1897).
(3) I. L. R. 33 Cal. 601 (1906).

(4) [1864] 12 W. R. 525.

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as an inseparable concomitant of rent, and in *Browne* v. *Pitto* (5), it was pointed out that in the Conveyancing Act, 1881, the term "rent" is used to include recurring payments not issuing out of the thing demised and for which accordingly there can be no distress. It is further pointed out in the Laws of England, Ed. Halsbury, Vol. 24, para. 1032, that the term rent is sometimes used in a very comprehensive sense and includes periodical sums of money charged upon or paid out of land and all corporeal hereditaments [*Skene* v. *Cook* (6).] It has also sometimes been observed that rent may issue, not only from lands and tenements corporeal, but also from the personal property necessary for their proper enjoyment; for instance, where a furnished house or a stocked farm is leased, in such cases the personal property is really a part of the consideration of the rent, so that when the view is sought to be maintained that the rent issues out of the land alone [*Selby* v. *Greaves* (7) and *Farewell* v. *Dickenson* (8)], there is an attempt at a fictitious accommodation of the case to the defective definition. To return to the Provincial Small Cause Courts Act, it is plain that the term "rent" in cl. (8) of the Second Schedule is used in a wide sense, otherwise the legislature would not have found it necessary to exclude explicitly house-rent from its scope. We are consequently of opinion that what is payable by the Defendants to the Plaintiffs in respect of forest rights granted to them, is in the nature of rent for the purposes of determining the jurisdiction of the Court, as it has been already held to be for the purposes of determining the question of limitation applicable to a suit for its recovery. [*Abdul-Ullah* v. *Asraf Ali* (1).] In this view, the plaint must be returned to the Munsif, so that he may entertain the suit and try it on the merits; the suit will be deemed for purposes of limitation to have been instituted in his Court on the date on which the plaint was originally presented.

(5) [1906] 2 Q. B. 683.
(6) [1902] 1 K. B. 682.
(7) L. R. 3 C. P. 594 (1686).
(8) 6 B. & C. 251 (1827).

(1) 7 C. L. J. 152 (1907).

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 919 OF 1914.

N. R. CHATTERJEA, J.
GREAVES, J.
1914,
Heard,
14, December.
Judgment,
21, December.

PEARY CHOUDHURY, Objector, Petitioner,
v.
SONOO DASS, Applicant, Opposite Party.

Consent decree obtained by fraud, setting aside of—Inherent jurisdiction of Court—Such decree if can be set aside on review—Civil Procedure Code (Act V of 1908), Or. 47, r. 1, Or. 41, r. 19—Court fee.

A decree passed by consent in an appeal was set aside on an application by the Respondent under Or. 41, r. 19, C. P. C., the Court finding that the Appellant got the service of the notice of the appeal suppressed and had a false and fraudulent vakalatnama *and a petition of compromise filed and that the Respondent came to know about the compromise decree only after process in execution of the decree was taken out.*

Held—*That Or. 41, r. 19, had no application to the case, but the decree could be set aside on review under Or. 47, r. 1, and the Court had also inherent jurisdiction to set aside the decree.*

That it is an inherent power of every Court to correct its own proceedings, when it has been misled, and the order of the lower Court should not be set set aside

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merely because it was passed under a wrong section.

That as the order could be summarily set aside by the Court, no Court-fee as on an application for review need have been paid on the application.

ANNODA DEBI *v.* STEVENSON (2), BASANGOWDA *v.* CHURCHIGIRIGOWDA (3), *relied on.*

GULAB KOER *v.* BADSHAH BUHADUR (1), *referred to.*

This was a Rule against the order of Mr. R. L. Datt, District Judge of Monghyr, dated 24th July 1914.

The order of the lower Court was as follows :—

"This is an application to set aside a decree in this appeal passed on the petition of compromise which purported to have been filed on behalf of both the parties. This petition has been filed by the Defendants, Respondents, on the allegation that no notice of appeal had been served on them and that they were not even aware that an appeal had been preferred, but the Appellant fraudulently caused forged *vakalatnamas* to be filed in Court purporting to have been on behalf of these Respondents and had also the forged petition of compromise filed on their behalf and they were not aware of the same or of the decree till a few days before the petition to set aside the decree on compromise was filed.

"In the suit the Plaintiff claimed Rs. 84 odd for *bhouli* rent for 2 cottahs odd land from the Defendants for 4 years. The Defendants contested the suit and the Plaintiff got a decree only for Rs. 11 odd besides Rs. 11 odd for costs. The compromise petition that appears to have been filed gave a decree to the Plaintiff for no less than Rs. 100 including costs. No sufficient reason has been shewn why the Defendants after having fought hard in the lower Court agreed to compromise for such a large sum. The deposition of the Appellant Lachman who used to look after the case for the 3 Defendants shows that no notice of appeal was served on the Defendants in this appeal, that he never went to Bhagalpur or got any *vakalatnama* or petition of compromise filed, and that only a few days before he filed this petition, chaukidar Ramrup told him that his property had been attached.

"After a consideration of the whole evidence, I think it is perfectly clear that the Appellant Peary Choudhury in order to take undue advantage over these illiterate Defendants, who had fought against him in the Munsif's Court, filed an appeal, but got the service of notice suppressed and even had the false and fraudulent *vakalatnama* and petition of compromise filed to harass these Defendants who came to know about the decree only after their lands were attached. It even appears from the deposition of Lachman that he had been offering Peary Choudhury that small amount decreed by the Munsif's Court, but Peary Choudhury had been telling him to wait and wait keeping him in ignorance that an appeal had been filed and fraudulent decree obtained. As the Petitioners were kept without knowledge of the fraudulent decree till a few days before this application was filed there is no limitation. The decree fraudulently obtained is set aside as obtained in the absence of the Defendants on the basis of *vakalatnamas* and a petition of compromise with which the Defendants had nothing to do."

Moulvi Khursed Hossain for the Petitioner.

(1) 13 C. W. N. 1197: s. c. 10 C. L. J. 420 (1909).
(2) 22 W. R. 290 (1874).
(3) I. L. R. 34 Bom. 408 (1910).

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Babu Karunamoy Bose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The Opposite Party in this rule made an application to the Court below to set aside a decree passed by consent in an appeal to which he was the Respondent. It is found by the learned District Judge that the Appellant, the Petitioner in this Court, got the service of the notice of the appeal suppressed and had a false and fraudulent *vakalatnama* and a petition of compromise filed, and that the Opposite Party came to know about the compromise decree only after process in execution of the decree was taken out. The learned Judge accordingly set aside the compromise decree and ordered that the appeal be heard. The Petitioner thereupon obtained this rule, and it is contended on his behalf that a decree by consent can be set aside only by a regular suit, and that at any rate the decree could not be set aside upon an application under Or. 41, r. 19, of the Civil Procedure Code.

Reliance is placed upon the case of *Gulab Koer* v. *Badshah Bahadur* (1) in which the questions whether a decree by consent can be set aside by an application for review or by way of motion, or whether a regular suit is the only, at any rate the most appropriate, remedy, have been elaborately discussed. It is unnecessary however to consider the broad questions or the authorities discussed in that case. In the present case, according to the finding of the Judge, there was no consent given by the Opposite Party to the decree : he did not appear in the appeal at all, and in fact had no notice of the appeal and had nothing to do with the *vakalatnama* or the petition of compromise. It is therefore not a case where a party gives his consent and afterwards seeks to impeach it on the ground that his consent was obtained by fraud. In *Gulab Koer's* case (1), the learned Judge in distinguishing the case of *Annoda Debi* v. *Stevenson* (2) (where the Judicial Committee of the Privy Council held that it was competent to the Court to set aside on review a decree against an infant who was not represented before the Court, and on whose behalf there was no assent to the compromise by any competent person) observed :—" This case is manifestly distinguishable on the ground that it was in essence an application by a person to vacate a decree which was made in her absence and without her consent. She asked to be relieved from the effects of a decree to which in substance she was not a party a condition of things entirely different from what we find in the class of cases where a person who is a party to a suit assents to a consent decree which he subsequently seeks to impeach on the ground that his assent was obtained by fraud ".

The decree in the present case therefore could be set aside on review. It is pointed out however that the decree has been set aside upon an application under Or. 41, r. 19. That rule relates to setting aside an order of dismissal of an appeal for default, and can have no application to the present case. It appears that the application to set aside the decree was originally made under Or. 47, r. 1 (the review section), but by a subsequent petition was amended so as to be an application under Or. 41, r. 19, of the Civil Procedure Code. If, however, the Court had the power to set aside the decree, we should not interfere merely because it was set

(1) 13 C. W. N. 1197 : s. c. 10 C. L. J. 420 (1909).

(2) 22 W. R. 290 (1874).

aside under a wrong section, and as for the contention that the proper Court-fee payable upon an application for review had not been paid, it could be met by our ordering (under sec. 12 of the Court Fees Act) the Opposite Party to pay the necessary Court-fee, if we were of opinion that the Court had no power to set aside the decree except by an application for review of judgment. We are of opinion, however, that under the circumstances found by the learned District Judge the Court had an inherent jurisdiction to set aside the decree. Not only has the Court power, but it is its duty, to set aside a decree obtained by fraud practised upon the Court, when apprised of it. We agree with the following observations made in a case in the Bombay High Court, in which a decree by consent was set aside in a summary manner upon an application by the Defendant :—"What the Defendant says is that there was a suit against him, and that the suit was declared to have ended by reason of a decree passed with his consent. He never consented, and the result has been that there has been fraud committed upon the Court. The Court was persuaded to sign a decree to which the Defendant had never consented and that upon the representation that he had consented to it. Therefore once the Court is asked to go back upon its own procedure, it is not a question whether there is any section in the Civil Procedure Code to warrant the action of the Court amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled". [See *Basangowda* v. *Churchigirigowda* (3).]

We are accordingly of opinion that the order of the Court below though passed under a wrong section should not be set aside.

(3) I. L. R. 34 Bom. 408 (1910).

The learned Pleader for the Petitioner invited us to hold that the findings of the learned Judge are incorrect, but we cannot in revision go behind the findings arrived at. As for the contention that the Petitioner may be prejudiced if any proceedings are taken against him upon the findings arrived at by the Judge, all that we need say is that there will be a fresh and independent enquiry if any such proceedings are taken against him.

The rule must be discharged with costs one gold mohur.

Rule discharged.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 1076 OF 1913.

HOLMWOOD, J.
SHARFUDDIN, J.
1914,
Heard, 3 and 4, February.
Judgment, 4, February.

C. BALTHASAR, Appellant,
v.
THE EMPEROR.

Indian Penal Code (Act XLV of 1860, sec 409—Criminal breach of trust by public auctioneer—Charge specifying criminal breach of trust on particular date in respect of goods entrusted—Conviction for such offence committed on subsequent date in respect of sale-proceeds of such goods—Dishonest intention, necessity of finding as to.

The Appellant who was a public auctioneer was placed on his trial under sec. 409, I. P. C., on a charge of having committed on the date mentioned in the charge criminal breach of trust in respect of some household furniture given to him by the Complainant for sale and remittance of the sale-proceeds to him. It appeared that the ordinary practice of the business was to pay the sale-proceeds out to the owners of the goods sold one month after the sale. The Trying Magistrate in convicting the Appellant found that, although he sold the Complainant's furniture on the date mentioned in the charge, he did not make

C. Balthasar v. The Emperor.

over the sale-proceeds to the Complainant one month after the date of the sale or at any subsequent time.

Held—*That no conviction could be had on that charge for the alleged misappropriation of the sale-proceeds of the furniture and that the offence having been said to have been committed on the date on which the furniture was sold the charge could not be applied to misappropriation of money on a subsequent date.*

That the conviction was also bad on the ground that there was no evidence and no finding of dishonest intention within the meaning of sec. 405, I. P. C.

Bipradas Giri v. Niradamoni Bewa (1), *referred to.*

This was an appeal against an order of Mr. K. B. Das Gupta, 5th Presidency Magistrate of Calcutta, dated 6th December 1913.

The charge which was framed against the accused is set out in the judgment of the High Court. The material portion of the Magistrate's judgment was as follows :—

"It appears from evidence adduced by the prosecution that the accused sold off 8 articles of the furniture on different dates, three on 24th November 1912 for Rs. 109, one on 5th December 1912 for Rs. 45 and two on 22nd December 1912 for Rs. 45 and the other two on two other dates, but never remitted to Mr. W. J. O'Grady his dues. Mr. W. J. O'Grady asked for his dues repeatedly, but the payments were not made. Then he caused the removal of the remainder of the furniture from the auctioneer's charge. Still the accused would not pay him. He wrote several letters, personally went and asked the accused for the money, but to no effect. The accused put him off from day to day. Mr. O'Grady threatened the accused with criminal actions, but that also went in vain. He waited still till September 1913 and then on 23rd September 1913 he put the matter into the hands of the police. The police enquired and sent up the accused for trial. These facts have been conclusively proved before the Court by the evidence of Mr. W. J. O'Grady as well as by several documents. From Mr. O'Grady's evidence I find that after waiting till 20th January 1913 he personally went to the accused and insisted on being paid. The accused wrote to him a letter (Ex. 1) saying that he would pay the money due by 20th February 1913 and sent him the accounts of his sale of the furniture (Exs. 21, 22, 23, 24 and 25) the next day. In the letter (coupled with the accounts) there is clear admission to the effect that the accused had sold off the furniture on the dates mentioned above and realised the sale-proceeds. But the accused never sent the money to Mr. W. J. O'Grady and put him off again from day to day and being tired of waiting he (Mr. O'Grady) instituted the criminal case in September next, *i.e.*, full nine months after. From the defence taken by the accused it is difficult to say what the accused's line of defence is. He never said nor suggested that he had not received the sale-proceeds and his own admissions point to the contrary. He has examined a few witnesses to prove that his dealings with them have been honest, but that does not in any way exculpate him of his dishonest dealings with Mr. W. J. O'Grady. There is clear evidence which the defence has failed to rebut that the accused is guilty of a dishonest violation of his contract with Mr. W. J. O'Grady ; he was entrusted with the furniture by Mr. O'Grady for sale and for re-

(1) 12 C. W. N. 577 (1908).

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mittance of the sale-proceeds to him, he sold the furniture, but misappropriated the sale-proceeds, he put the money into his own pocket and never sent it to Mr. W. J. O'Grady. The evidence adduced by the prosecution goes also to show that he has similarly dealt with two others of his customers, one Mr. Banerman and another Mr. Sale. I find a clear case under sec. 409, I. P. C., made out against Mr. Balthasar on all the three counts of the charge framed against him of having committed criminal breach of trust as an auctioneer in respect of Mr. W. J. O'Grady's furniture on three different dates and convict him accordingly."

Mr. Bagram and *Babu Tarakeswar Pal Choudhury* for the Appellant.

Babu Manmotha Nath Mukherjee for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal from the judgment and sentence of the learned Presidency Magistrate, 5th Court, convicting the Appellant C. Balthasar of an offence under sec. 409, I. P. C., and sentencing him to pay a fine of Rs. 500 or in default to be rigorously imprisoned for 4 months on the first count of the charge, no separate sentence being passed on the other two counts of the charge.

The first objection raised to this conviction is that the charge is defective and misleading and that no conviction can be held upon that charge for the alleged misappropriation of the sale-proceeds of the furniture. The second objection is that there is no finding of when and how the Appellant criminally misappropriated the sale-proceeds and nothing to show dishonest intention.

The charge is a curious one and runs as follows:—That you on or about the 24th November 1912, in Calcutta, being a public auctioneer, committed criminal breach of trust in respect of three articles of household furniture, almirah, etc., worth Rs. 109 given to you by Mr. W. J. O'Grady for sale and remittance of the sale-proceeds to him, and you thereby committed an offence under sec. 409, I. P. C.; and the other two charges are similar with regard to sales of furniture on the 5th December 1912 and on the 22nd December 1912.

It is argued and in our opinion very forcibly argued that this charge cannot possibly relate to the alleged misappropriation of the sale-proceeds. Sec. 405 says, whoever being in any manner entrusted with property or with any dominion over property dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law, or of any legal contract, express or implied, which he has made touching the discharge of such trust, is guilty of criminal breach of trust. Now substituting the word "furniture" for the word "property" it would be clear that the section does not cover misappropriation of the sale-proceeds. But even assuming as we think it ought to be assumed that the word "property" includes furniture or the value thereof, even then it could not be said that the Appellant had disposed of the furniture or the value thereof, namely, the sale-proceeds in violation of his contract dishonestly, unless it were shewn that he had the intention of dishonestly appropriating the sale-proceeds at the time of the sale; and the dates given in the charge clench this contention which is admitted by the learned Vakil for the prosecution. He says that it is incumbent on the prosecution to prove that on the date of sale the

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NOTES.

The late Hon'ble Mr. Gokhale.

The death of The Hon'ble Mr. Gokhale in the very prime of his life is such a great loss to the whole of India that we feel that we shall be wanting in our duty if we did not pay also our own humble tribute to the illustrious deceased. A man of keen intellect, quick grasp, broad views and a devoted student of history and economics, he was born, bred and destined to be a great statesman. There was not another man either amongst the officials or non-officials who had a greater grasp of the Indian finances. Although that was his *forte* yet in measures of legislation and policy of Government as well his quick and incisive intellect and strong common sense discovered flaws which were of the most material assistance to his colleagues in Council and of great practical benefit to the Indian public. Although he had never cultivated the study or practice of law, yet the power of cross-examination that he displayed in connection with the Public Services Commission won for him the admiration of the veterans of the legal profession. Through his power of debate and the reasonableness of his views he secured the respect and esteem of his official colleagues in the Council. The tact and judgment that he displayed in putting the case of the Indian community before the South African Government and his efforts to bring about a settlement of the Indian question in South Africa would have done credit to trained diplomats of first rank. With his remarkable powers of criticism and debate he combined a moderation in his views which made him a most valuable intermediary between the Government and the people. In his untimely death India has suffered a loss which will not soon be replaced. There has never been in India a warmer advocate of primary education. Through his death the cause of education and the regeneration of the Indian masses has received an almost irreparable check. It is also a great pity that the Public Services Commission will not receive the benefit of his deliberations and criticism at the report stage of the Commission. Looking at it from any point of view, his death is a great calamity to the country.

The Hon'ble Mr. Justice Coxe.

His Lordship, the Hon'ble Mr. Justice Coxe, is going away on furlough. He has lost two sons in the War and it is unlikely that he will return again to India. His impending retirement is keenly regretted by those who practised before him, for his Lordship combined in himself some of the rarest qualities of an Appeal Court Judge. His Lordship's tenure of office synchronised with a period of heavy accumulation of judicial business in the High Court, and it is undeniable that one of the chief pre-occupations of Judges during this period has been the working off of arrears. At such a time the tendency to regard judicial business as routine work to be got through as speedily as possible must be very hard to resist, and it needs no small amount of strength of mind and devotion to duty not to yield to a desire for hurry. But Mr. Justice Coxe never yielded to any such temptation.

It was also his innate desire to deal with the cases upon their own merits that enabled him to decide cases without being influenced by the personality of the Counsel or Vakil appearing before him. He was never known to be impatient of argument, and not one single act of discourtesy whether by word or gesture will be remembered against him. The impartial and absolutely "correct" attitude which he uniformly maintained on the Bench was amply

re-paid by the deference habitually paid to him by the Bar and the speed with which business before him was transacted. The regret with which his Lordship's departure from India will be viewed is all the keener, because of the melancholy circumstances which have led to it, when yet so many years of active life were before him. The loss sustained by the Bench by his retirement will not be easily replaced.

Mr. W. H. Joyce.

Mr. Joyce, Deputy Registrar in the Appellate Side of the High Court, retires from office from date. He was a very able and experienced officer who rose to the important position he held from a subordinate rank. In spite of the heavy burdens of his office he was kind, courteous and obliging to all alike and was universally liked by his subordinates. Mr. Waite, who has also gained great popularity with all sections of the community as Private Secretary to several Chief Justices of the Calcutta High Court, succeeds Mr. Joyce as Deputy Registrar, and Babu Hem Chandra Mitter, one of the Senior Bench Clerks, succeeds Mr. Waite as Private Secretary to the Chief Justice. We congratulate His Lordship on the excellent selections he has made.

Review.

TAGORE LAW LECTURES, 1913: Compulsory Sales in British India. *By Samatul Chandra Dutt, M.A., B.L., Vakil, High Court, Calcutta. Butterworth & Co. (India) Ltd., 6A, Hastings Street, Calcutta. Price Rs. 12 net.*

This is a praiseworthy treatment of a somewhat uninviting subject. For one thing, it gives very little scope for display of originality. That it does offer some variety and has furnished materials for a compilation of 300 odd pages is due to the purely accidental circumstance of there being a variety of sale laws in Bengal. Of these, the Putni Sale Regulation is the one which comparatively speaking should excite the greatest amount of human interest, the Revenue Sale Law coming next. Take away these two, and the subject is reduced to one uniform level of unmitigated drab. We have not enquired how those who listened to these lectures were affected from the point of view of sentiment. But we find it difficult to imagine that even the most historically minded of them were roused to any conceivable pitch of enthusiasm by what should be the most interesting chapter, *viz.*, that on Sales for Arrears of Putni Rent in Bengal. But every one of them must have been impressed by the severe logic and co-ordinating industry which the author has brought to bear on the entire subject. He has even been able to devote 40 pages to discussing general principles. This chapter is instructive. The merits of the book will, we think, be best summed up by saying that it is an able and well arranged summary of the statute and case-law on the several varieties of compulsory sales which obtain in this country, with an introductory chapter dealing with such general principles as may be supposed to lie at the foundation of them all.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before THE LORD CHIEF JUSTICE, THE MASTER OF THE ROLLS, and LORDS JUSTICES KENNEDY, BUCKLEY, SWINFEN EADY, PHILLIMORE and PICKFORD. *Porter* v. *Freundenberg* and *Kreglinger* v. *S. Samuel and Rasenfeld.* Heard, 19th January 1915.

Alien enemy, who is—Right to sue and be sued—Alien enemy cannot sue but may be sued—Alien enemy who has been sued and lost may appeal—An alien enemy who had sued before war and lost cannot appeal during war—Service on alien enemies and their agents and servants—Substituted service.

These appeals raised the question as to the meaning of an "alien enemy," and the right of such "alien enemy" to sue and be sued, in British Courts of Justice.

The Attorney-General (*Sir John Simson*) with him *Mr. Branson* and *Mr. Nesbitto* appeared for the Crown.

Mr. C. E. Fitch for the Appellant in first case; *Mr. Storry Deans*, for Appellants in the second case; *Mr. Walter* and *Mr. Courtney Terrell*, for Appellants in the third case; *Mr. H. Fletcher Moulton* for Respondents in the motion.

The Attorney-General argued that an alien enemy did not mean a subject of a State which was at war with Great Britain, but a person of whatever nationality who resided or carried on business in the enemy's territory. The test was where the man was, and not whose subject he was. Whether a German who resided in Great Britain was an alien enemy, depended on whether he was commorant here, with an ex-

press or implied license from the Crown, or under the protection of the Crown. A German domiciled here, or carrying on business here, was not an alien enemy. On the other hand, an Englishman carrying on business in Germany was an alien enemy: *Janson* v. *Driefontein*, (1902), A. C., p. 484. An alien enemy could be sued here: *Albrecht* v. *Sussmann*, (1813), 2 Ves. and B., p. 323. In that case an alien enemy had succeeded in obtaining discovery, but he submitted that an alien enemy could not sue: *Hastings* v. *Blake* (Nye's Rep., p. 1) *Hall* v. *Trussell* (Moore's Rep., p. 753), *Ramsden* v. *MacDonald* (1 Wilson, p. 217), and *Verney*, otherwise *Joyner's case* (2 Dyer, p. 45), and see, too, *Ex parte Bonosmaker* (13 Ves. Jun., p. 71). Other authorities were Coke's "Institutes," p. 127a, Story's "Commentaries on Equity Pleadings" (Ed. of 1838), secs. 51 to 54a, *McNeigh* v. *United States* (1 Wallace, p. 259) and Walford's "Parties to Actions" (1842), Vol. 1, p. 617. No contract made with an alien enemy in time of war could be enforced in British Courts. Again, an alien enemy who appeals must be Defendant in an action, started after the war. An alien enemy could defend himself by appealing. In so doing he was not invoking the aid of the King's Courts in his own favour, but he was availing himself of the machinery, set in motion by another person, in order that the ultimate decision might be right.

He submitted that the decided cases supported the following propositions :—

(1) An alien enemy could not maintain an action except by licence of the Crown express or implied.

(2) If he was in this country, whether with or without licence, he was not exempt from being sued like any other person.

(3) If brought before the Court, he had the same right to employ counsel and solicitors and also to appeal as any other Defendant.

(4) The same rules applied to an alien enemy as to service of writ or notice of writ as to any other foreigner.

(5) The method of service prescribed by Or. 11, r. 8, was not in fact applicable in case of war, and then recourse must be had to r. 7 of Or. 11 and r. 2 of Or. 9, the question being, if the Defendant could not be served personally, what was just in the way of substituted service?

(6) If an alien enemy left any one in charge of his business, it was just to allow service on that person, either alone or combined with other methods.

(7) Otherwise service by post through a neutral country ought to be allowed if there was any reasonable probability of its coming to the knowledge of the person to be served.

(8) The position under Or. 48A was extremely anomalous. There was no reason why service could be effected on the manager of two alien enemies carrying on business under a firm name, while it could not be effected on the manager of one alien enemy carrying on business under a firm name.

The Court reserved judgment, which was delivered on the 19th January 1915, as follows:

The LORD CHIEF JUSTICE read the judgment of the Court, in which he said :—The main questions to be considered are, first, the capacity of alien enemies to sue in the King's Courts; secondly, their liability to be sued; thirdly, their capacity to appeal to the Appellate Courts, and generally their right to appear and be heard in the King's Courts. It may be useful to refer to some of the early authorities, although the main propositions of law have long been well settled. It is necessary at the outset to keep clearly in mind the meaning of the term "alien enemy" when used in reference to civil rights and liabilities. Its natural meaning indicates a subject of enemy nationality, that is, of a State at war with the King, and would not in any circumstances include a subject of a neutral State or of the British Crown, but that is not the sense in which the term is used in reference to civil rights. Ever since the great case of *The Hoop*, (1799), 1 C. Rob., p. 196, the law has been firmly established as pronounced in the judgment of Lord Stowell, then Sir William Scott, that one of the consequences of war was the absolute interdiction of all commercial intercourse or correspondence by a British subject with the inhabitants of the hostile country except by permission of the Sovereign. [See also *Potts* v. *Bell*, per LORD KENYON, C. J., 8 Term Reports, 561; *Esposito* v. *Bowden*, (1857) 7 E. and B., 779.]

It is clear law that the test is not nationality, but the place of carrying on the business. [*Wells* v. *Williams*, 1 Lord Raymond, 282; *McConnell* v. *Hector*, per LORD ALVANLEY, 3 B. and P., 113; and *Janson* v. *Driefontein Consolidated Mines (Limited)*, (1902), A. C., 484, per LORD LINDLEY, p. 505.] When considering the enforcement of civil rights, a person may be treated as the subject of an enemy State notwithstanding that he is in fact a subject of the British Crown or of a

neutral State. Conversely, a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy State. [*Janson* v. *Driefontein Consolidated Mines (Limited).*] Lord Lindley for the purposes of the appeal then before the House of Lords was considering the character of a trading corporation, and did not purport to deal with persons residing but not carrying on business in the enemy territory. . . . Professor Dicey in his Treatise on Parties to an Action at p. 3 states the law accurately in the following proposition :—"Under the term alien enemies are included not only the subjects of any State at war with us, but also any British subjects or the subjects of any neutral State *voluntarily* resident in a hostile country."

In ascertaining the rights of aliens the first point for consideration is whether they are alien friends or alien enemies. Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's Courts. Alien enemies have no civil rights or privileges, unless they are here under the protection and by permission of the Crown (Blackstone's Commentaries, 21st Edn., Vol. I, c. 10, p. 373).

Whenever the capacity of an alien enemy to sue or proceed in our Courts has come for consideration the authorities agree that he cannot enforce his civil rights and cannot sue or proceed in the civil Courts of the realm. The latest adjudication upon the alien enemy's right to sue is *Princess Thurn and Taxis* v. *Moffit* (31 T. L. R. 21 : s. c. 19 C. W. N. viii), where Sargant, J., held that the subject of an enemy State who was registered under the Aliens Restriction Act, 1914, as an alien and the subject of an enemy State is entitled to sue in the King's Courts. This decision is, in our opinion, clearly right. Such an alien is resident here by tacit permission of the Crown. He has by registration informed the Executive of his presence in this country and has been allowed thereafter to remain here. He is "*sub protectione domini regis.*"

We have now to consider whether The Hague Convention of 1907 on the Laws and Customs of War on Land [Article 23 (*h*) of chapter 1 of section 2 of [illegible] Annex, entitled "Regula[illegible] respecting the laws and customs of war [illegible]d"] has any bearing upon the questions conceiva[illegible] determine. The heading of that [illegible] Of Hostilities." Section III is headed "Military Authority over the Territory of a Hostile State." Chapter I, of section II, is entitled, "The Means of Injuring the Enemy Sieges and Bombardments." The Articles in it are numbered from 22 to 28.

The important paragraph is 23 (*h*) :

"To declare abolished, suspended, or inadmissible the right of the subjects of the hostile party to institute legal proceedings."

The substantial question being whether the operation of this paragraph is or is not to abrogate the old rule (not peculiar to English Law, though it has been more prominent in England than elsewhere), that an alien enemy's rights of action are suspended during the war, jurists of eminence have expressed widely divergent views upon the point and this Court has given to those views its very careful consideration. We are all clearly of the opinion that the paragraph in question cannot be treated as effecting any such abrogation. If we look in the first place at the terms of the paragraph itself and apart from its collocation and context we find that what it forbids is as also in paragraph (*d*) a "declaration": "It is forbidden to declare." This has no application to a country in which as in England there is no room for a declaration. By the existing law of the country the mere fact of war operates *ipso facto* to suspend any rights of action which at the time of the outbreak of war any alien enemy may possess. It is interesting to observe that Dr. Sieveking, an eminent German jurist, is of opinion that as to England at any rate it is ineffectual because it only prohibits some executive authority from declaring that rights of action are suspended, extinguished, or inadmissible. He rightly points out that no such declaration is required in English Law for the reason already given.

Extending our view from the paragraph itself to the immediate context, we find that it is included in a group of paragraphs forming Article 23, every other of which relates solely to the conduct of a military force and its commanders in a campaign and not at all to the administration of the law respecting alien enemies at home; that the chapter of which the Article forms part is entitled "Means of Injuring the Enemy, Sieges and Bombardments," and that the section of the Annex to which the chapter belongs bears the general heading "Of Hostilities." Extending our view still further to the Convention itself we find the declaration which governs the whole Annex and controls its application in Article 1 :

"The contracting powers shall issue instructions to their armed land forces which shall be in conformity with the regulations respecting the laws and customs of war on land annexed to the present Convention."

It is impossible to suppose that this means [as it must do if the effect of the paragraph (*h*) is to abrogate the law existing hitherto in England and to give an alien enemy the position of a *persona standi in judicio* in English Courts of Law] that the War Office of Great Britain shall in the present war for this purpose issue instructions to Sir John French commanding our land forces in the field, forbidding him to "declare" that the rights of alien enemies, Germans, Austrians, or Turks, to institute legal proceedings in the High Courts of Justice in London are suspended or inadmissible. And yet this absurdity seems necessarily to follow from the scheme of the Convention as applied to paragraph (*h*) if the interpretation of this paragraph is that which is contended for by those who find in it an abrogation of our law which hitherto has not given to an alien enemy the position of a *persona standi in judicio*.

Our view is that Article 23 (*h*), read with the governing Article 1 of the Convention, has a very different and a very important effect, and that the paragraph if so understood is quite properly placed as it is placed in a group of prohibitions relating to the conduct of an army and its commander in the field. It is to be read in our judgment as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their Courts of Law in order to assert or to protect their civil rights. For example, if the Commander-in-chief of the German forces which are at the present moment in military occupation of part of Belgium were to declare that Belgian subjects should not have a right to sue in the Courts of Belgium he would be acting in contravention of the terms of this paragraph of the Article. . . . . . .

The next point to consider is whether he is liable to be sued in the King's Courts during the war. To allow an alien enemy to sue or proceed during war in the civil Courts of the King would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy. *Primâ facie* there seems no possible reason why our law should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of law suspending the alien enemy's right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by MR. JUSTICE BAILHACHE in *Robinson & Co.* v. *Continental Insurance Company of Mannheim* (31 T. L. R. 20), "To hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule." In our judgment the effect would be to convert that which during war is a disability imposed upon the alien enemy because of his hostile character into a relief to him during war from the discharge of his liabilities to British subjects.

Once the conclusion is reached that the alien enemy can be sued it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of Justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.

Equally it seems to result that when sued if judgment proceed against him the Appellate Courts are as much open to him as to any other Defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the Appellate Court by giving the notice of appeal which is the first necessary step to bring the case before that Court, but he is entitled to have his case decided according to law, and if the Judge in one of the King's Courts has erroneously adjudicated upon it, he is entitled to have recourse to another and an Appellate Court to have the error rectified.

We must now consider whether the same conclusion is reached in reference to appeals by an alien enemy Plaintiff that is a person who before the outbreak of war was a Plaintiff in a suit and then by virtue of his residence or

place of business became an alien enemy. As we have seen, he could not proceed with his action during the war. If judgment had been pronounced against him before the war in an action in which he was Plaintiff, can he present an appeal to the Appellate Courts of the King? We cannot see any distinction in principle between the case of an alien enemy seeking the assistance of the King to enforce a civil right in a Court of first instance and an alien enemy seeking to enforce such right by recourse to the Appellate Courts. He is in either case seeking to enforce his right by invoking the assistance of the King in his Courts. He is the "actor" throughout. He is not brought to the Courts at the suit of another, it is he who invokes their assistance and it matters not for this purpose that a judgment has been pronounced against him before the war. When once hostilities have begun he cannot so long as they continue be heard in any suit or proceeding in which he is the person first setting the Courts in motion. If he had given notice of appeal before the war the hearing of his appeal must be suspended until after the restoration of peace.

Having now dealt with general principles we proceed to consider their application to the three appeals before us. The Plaintiff in the first appeal issued a writ against one Phillip Freundenberg (trading as Hermann Gerson) to recover a quarter's rent due on September 29th, 1914, under a lease made in 1903 of certain premises situate in Hanover Square, London. The Defendant resides and carries on business as a mantle manufacturer in Berlin, and had for some time before the outbreak of war carried on a branch establishment at the above premises by means of an agent named Arthur Barnes. According to the affidavit of the Plaintiff a quantity of stock was usually kept on the premises, but immediately before September 29th the whole of the stock, fixture and fittings was removed from the premises. On September 28th the keys of the premises were sent to the Plaintiff by Barnes, which the Plaintiff intimated would be held at the disposal of Barnes as the agent of the Defendant. The Plaintiff having issued his writ applied to Mr. Justice Scrutton for directions as to the manner of serving it upon the Defendant in Berlin. The learned Judge gave liberty to the Plaintiff to issue a concurrent writ against the Defendant and to serve notice of the writ in Berlin. In view of the difficulty of serving the notice of writ on the Defendant, Mr. Fitch on behalf of the Plaintiff asked this Court to make an order for substituted service of the notice of writ by allowing service of it upon Barnes or otherwise as the Court might direct.

In the second appeal the Plaintiffs Kreglinger are skin and hide merchants carrying on business in London and at Antwerp. Before the outbreak of war they had entered into contracts for the sale of cargoes of hides from Australia to the firm of S. Samuel and Rosenfeld carrying on business in London. Before the outbreak of war the firm of S. Samuel and Rosenfeld intimated that they did not intend to carry out the contracts. After the outbreak of war a writ was issued and the Plaintiffs claimed to have effected proper service of it upon the firm by leaving it upon one Bonome, a person who appeared to be in control or management of the business here. (See Order 48, rule 3.) Bonome entered a conditional appearance and applied to set aside the service. Mr. Justice Scrutton set it aside on the ground that one Alfred Cohen, who resided at Hamburg, was the sole proprietor of the business of Samuel and Rosenfeld, and therefore Order 48, rule 3, did not apply, as there were not two or more partners carrying on business within the jurisdiction. An unsuccessful attempt was made to establish that Bonome was a partner in the firm.

Evidence was taken before the Master, and it appeared that Bonome was not a partner, but was the manager of the business in London for Alfred Cohen, with full authority to act in all matters in respect of the said business. The Plaintiffs only knew Bonome and transacted all their business with the firm with him. Mr. Justice Scrutton, in the Plaintiffs' application, gave leave to issue a concurrent writ against Alfred Cohen with liberty to serve notice of the writ at Hamburg in Germany, but refused leave to make substituted service of the notice of writ by serving it upon Bonome.

The Plaintiffs appeal from this refusal and ask this Court in view of the circumstances and the difficulty if not impossibility as they suggest of effecting service upon Alfred Cohen during the war to permit them to make the service upon Bonome inasmuch as he appears to be the person in charge of the Defendants' interests in this country. We are at this moment engaged only in determining questions as to the proper mode of service and are expressing no opinion, except in this connection, as to the position of Bonome.

The Courts having decided that the alien

enemy can be sued have to consider how effective notice of the proceedings in the Courts of this country can be served on the alien enemy in the enemy country. Diplomatic relations between the two nations have been broken off and a serious question might have arisen whether in these circumstances Order XI, rule 8, was applicable. Before the outbreak of war Germany was by order of the Lord Chancellor a country to which this rule applied and so long as that Order stood the procedure to be adopted for service in Germany was regulated by that rule. That Order has, however, been revoked by the Lord Chancellor, and it therefore becomes unnecessary further to consider whether the rule that this procedure therein prescribed "*shall* be adopted" could be held applicable during a war between us and the country in which the service was to be effected.

Unless an order for substituted service in this country of a notice of writ for service out of the jurisdiction can be made in a proper case great hardship may be inflicted upon persons who are subjects of and resident in this country who have given credit or entered into contractual relations with or have claims against persons who are now alien enemies to the manifest advantage of the alien enemies and disadvantage of British subjects and subjects of other States who wish to sue in this country. This Court, while bearing this consideration in mind, must also take into account the position of the Defendant the alien enemy who is, according to the fundamental principles of English Law, entitled to effective notice of the proceedings against him. It is obvious that in all cases against the alien enemy the Plaintiff will seek, if possible, an order to make substituted service in this country. It is desirable, therefore, to consider in some detail—

(1) In what circumstances substituted service can be ordered; and (2) whether substituted service within the jurisdiction can be ordered of a notice of writ for service without the jurisdiction.

The general rule is that an order for substituted service of writ of summons for service within the jurisdiction cannot be made in any case in which at the time of the issue of the writ there could not be at law a good personal service of the writ because the Defendant is not within the jurisdiction. . . In order that substituted service may be permitted, it must be clearly shown that the Plaintiff is, in fact, unable to effect personal service, and that the writ is likely to reach the Defendant or to come to his knowledge if the method of substituted service which is asked for by the Plaintiff is adopted. The Court may then make such order as may seem just (Order IX, rule 2). The terms of this rule are of very wide application and give a very wide discretion, which we are not inclined to limit. In the case of a writ properly issued under one of the heads of Order XI, rule 1, for service out of the jurisdiction substituted service, either within or without the jurisdiction, may be permitted in special circumstances, as, *e.g.*, that the Defendant is evading personal service of such writ and that the proposed form of substituted service will be effectual in bringing the writ to the Defendant's knowledge (see *Ford* v. *Shephard*, 1885, 34 W. R., p. 63, also reported in 53 L. T., p. 504; *Western, etc., Building Society* v. *Rucklidge*, (1905) 2 Ch., p. 472, *per* MR. JUSTICE SWINFEN EADY).

In the case of a notice in lieu of writ to be served on a foreigner out of the jurisdiction on order properly obtained under Order XI, rule 1, there is no reason why substituted service of that notice should not be permitted in similar circumstances to those in which it is permitted in the case of a writ for service out of the jurisdiction. As to substituted service of such a notice, Order XI, rule 7, and Order IX, rule 2, give power to order it. Certainly under Order XI, rules 8 (1) and 5, it is contemplated that this may be done, for it prescribes the method of doing it, and *Ditton* v. *Bornemann*, 3 T. L. R., p. 3 [a decision on the practice before the introduction of rules 8 and 8(*a*)], favours the view that the substituted service of a notice of a writ may be allowed. . . . The Judge in Chambers before whom the application is made for substituted service of a writ for service out of the jurisdiction or of a notice of such a writ ought to be careful before acceding to the application—(*a*) to satisfy himself that there exists a practical impossibility of actual service, as otherwise, inasmuch as there is always a certain amount of difficulty and delay in effecting service out of the jurisdiction under Order XI, a Plaintiff will always seek to obtain an order for substituted service with the serious risk that the Defendant may never have notice of the proceedings, and judgment in default of appearance may be given against him unjustly; (*b*) to satisfy himself for the same reason that the method of substituted service asked for by the Plaintiff is one which

will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the Defendant.

Our English procedure has hitherto been laudably superior to the Continental in not permitting that which may be called "constructive service," such, *e.g.*, by published notices or advertisements whereby a Defendant may be condemned unheard because he has had no knowledge of the proceedings against him. In *Porter* v. *Freundenberg*, the writ was issued for service within the jurisdiction, the Defendant being abroad at the time of the issue of the writ. There could therefore be no order for substituted service of that writ. Leave having now been given to issue a concurrent writ and to serve notice out of the jurisdiction that difficulty is removed. The proper order to make in the circumstances in this case and also in *Kreglinger* v. *Samuel and Rosenfeld* is to give the leave to make substituted service and to refer both cases back to Chambers for directions as to the mode of effecting it. Upon the materials now before us we think service of the notice should be effected in the one case by substituted service upon Barnes and in the other upon Bonome, and such further terms should be imposed in Chambers upon the Plaintiff as to advertisement or other means of communication and as to the period to be given to the Defendant for appearance as may seem proper. . . .

In the third appeal the matter came before us on a motion to set aside the appeal on the ground that the Appellants were alien enemies. Soldan & Co. (Limited), an English company, presented a petition for revocation of a patent granted to a German subject resident in Germany, of which patent a German company were the owners. The petition was heard by Mr. Justice Warrington, who made an order on July 28th, 1914, for revocation of the patent, but if notice of appeal was given on or before August 28th, 1914, the operation of the order was to be suspended until the hearing of the appeal. Notice of appeal was given on August 28th. War was declared between His Majesty the King and the German Emperor on August 28th. War was declared between giving the notice of appeal the said Appellants were alien enemies, and the notice of the motion now before the Court was launched to set aside the notice of appeal upon that ground. At the hearing before us Mr. Walter, on behalf of the Petitioner, admitted that he could not succeed on the motion and did not now apply to set aside the appeal, but he did ask the Court to express its opinion that the hearing of the appeal was not suspended and that it could be heard during the war. The position was peculiar, inasmuch as Mr. Moulton, on behalf of the Appellants, did not dispute that his clients were alien enemies, but insisted in the interest of his clients not upon their right to be heard, but that their appeal could not be heard until after the restoration of peace. If we acceded to that view, and the order for suspension of the revocation of the patent stood, as made by Mr. Justiee Warrington, alien enemies who are the owners of the patent would be in a distinctly advantageous position so long as the war lasted. It is not surprising, therefore, that Mr. Walter, on behalf of the Petitioners, insisted that the appeal of the alien enemy could be heard, and asked this Court to give an intimation to that effect. The Appellants were the Respondents to a petition. They were brought to the Court at the instance of another, because they were the owners of the patent rights. The alien enemy Appellants were not the "actors" in the proceedings; these were initiated by the Petitioners, and notice was served upon the Appellants for revocation of the patent rights they had acquired.

The Appellants must be regarded for this purpose in the same position as a Defendant in a suit who appeals from a judgment given against him. In accordance with the opinion we have already expressed, the Appellants were therefore entitled not only to appear, and be heard on this motion, but to have their appeal heard in the ordinary course, notwithstanding the war. We cannot accede to their contention that the hearing of the appeal must be suspended during the war.

The motion must be dismissed, but, in view of the peculiar circumstances, without costs.

B. D.

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accused intended to misappropriate the sale-proceeds. There is absolutely no evidence for that and indeed all the evidence goes to the contrary. There was regular business going on and all moneys received were paid into the account of that business, and the ordinary practice of the business was to pay the sale-proceeds out to the owners of the goods sold one month after the sale, and it is put forward as evidence of the dishonest intention of the Appellant that not having been able to pay the money due on the 23rd December in connection with the sale of the 24th November he still went on selling the furniture for Mr. O'Grady on the 29th December and took the sale-proceeds. But this apparently was with Mr. O'Grady's knowledge and consent, and it was not till January or February that Mr. O'Grady removed the remainder of his furniture from the Appellant's hand. It cannot be said that the auctioneer is liable for criminal breach of trust if he does not punctually carry out every term in the agreement. For instance if he did not hold the sale on the agreed date, the 24th November, it could not be said that he committed criminal breach of trust. In the same way if there was delay in payment, that is not in itself a breach of trust. On the dates in the charge it is clear that the wider sense which is sought to be given to the charge cannot possibly be accepted. The offence having been said to have been committed on the 24th November, it cannot be applied to misappropriation of money on or after the 23rd December. It is conceivable that a charge might have been framed to cover the whole circumstances of the transaction, but this is not such a charge, and it seems to us to fall within the rule laid down in the case of *Bipradas Giri* v. *Niradamoni Bewa* (1) to which one of us was a party, that where the charge against the accused is to the effect that he committed breach of trust in respect of some property which he took from the Complainant and was therefore guilty of an offence punishable under sec. 406, but at the trial he was convicted of embezzling not the property but the amount obtained by dealing with the property, that the conviction was bad and must be set aside. We are therefore of opinion that on the first point this appeal must succeed and the conviction and sentence must be set aside.

But as that might render a re-trial necessary we must also proceed to deal with the second point, namely, whether there is any finding or any evidence of dishonest intention referable to the 24th November, 5th December and 22nd December, respectively, in respect of these three charges. We are unable to find any such finding or any such evidence, and none has been shown to us. It is not pretended that on the dates of the auction-sales the Appellant had the slightest dishonest intention or did not mean to make good the money to the Complainant.

It is admitted that owing to terrible domestic misfortune in which the Complainant himself deeply sympathized, he was unable to attend to his business and fell into grave pecuniary difficulties. Under these circumstances he has been unable to satisfy his creditors of whom the Complainant is one. But that he has been endeavouring to do so is clear from the evidence of Mrs. Breman who although she comes forward with the allegation that she has been cheated by the Appellant admits that she has been paid every penny of her money except Rs. 2-13. Then again it is sought to

(1) 12 C. W. N. 577 (1908).

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show dishonesty from the evidence of one Mr. Salt, a Civil Engineer, who says that he instituted a case on the same ground as the present case against the Appellant in the Second Presidency Magistrate's Court, but withdrew it on getting a *hundi* which subsequently turned out to be "a bogus one on a forged Bank (whatever that may be) and it was dishonoured." He was cross-examined to show that he had received a notice from the Court prohibiting the accused from paying the money on the *hundi*. This he denied, but the learned Counsel who appears for the Appellant has very rightly laid before us the actual order of this Court prohibiting the Appellant from paying the money due on that *hundi* to Mr. Salt on the ground that it was attached by one of Mr. Salt's creditors. There is therefore absolutely no evidence of dishonesty in this incident, nor had it been shown that the Appellant acted dishonestly towards Mr. Salt could we have accepted that as any evidence of intention in the present case, for we are not aware when these transactions took place with Mr. Salt, and there is nothing in the evidence to show us. We are therefore on the second point also of opinion that the conviction is bad, there being no evidence and no finding of dishonest intention within the meaning of sec. 405, I. P. C.

The conviction and sentence are therefore set aside and the accused acquitted. The fine if paid will be refunded, and the Appellant will be discharged from his bail.

Accused acquitted.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
Heard,
29, October and
2, November.
Judgment,
26, November.

JEHANGIR DADABHOY and anr., Appellants,
v.
KAIKHUSHRU KAVASHA and others, Respondents.

Indian Succession Act (X of 1865), sec. 111—Bequest to two sons "half and half"—Gift over to son to be born to one of them on attaining majority, whether takes effect when son survives testator—General principles of construction.

A Will provided that the two sons of the testator were to be "proprietors, half and half alike" of his whole estate, but the elder son, P, being of weak intellect, the younger, J, was entrusted with the management of the estate and it further provided that if the elder son, who had only a daughter, should get a male issue, "half of the estate was to be made over to him on his attaining full age" and his "Vakil (executor), J, or his heirs shall raise no objection to give him the share". P survived the testator and never had a son.

Held—*That on the testator's death, P became absolute owner of half of the estate.*

That according to the general principles which would be applicable in the construction of such a Will, and equally under sec. 111 of the Succession Act, the gift over to a son of P who should take upon attaining 21 years of age was appropriate to the events of the death of P during the lifetime of the testator and of his having left a son—the situation also being provided for of that son being at that period of time under 21.

This appeal related to the construction

of a Will of a Parsi, the material portions of which appear from their Lordships' judgment. The Courts below allowed the Plaintiffs' claim. The judgment of G. S. Rao, J., in which Batchelor, J., concurred, was as follows :—

"The Subordinate Judge held that upon the true construction of Dadabhoy's will his sons Pallonji and Jehangirji took an absolute interest in equal shares in the residuary estate, that Jehangirji managed Pallonji's half share in the estate as a trustee for Pallonji, that Byramji (Defendant 2) did not take any interest under Dadabhoy's will, that the suit was in time, and that Pallonji's estate passed on his death to his heirs—Plaintiff and Defendants Nos 3 and 4, their shares being 1/9th, 2/3rds, and 2/9ths respectively.

"The Subordinate Judge passed a preliminary decree, appointing a Commissioner to take an account of the property of Dadabhoy which came into Defendant 1's possession since Dadhabhoy's death, and report as to what fund moveable as well as im moveable was now available for distribution among the heirs of Pallonji

"Against this decree Defendants Nos 1 and 2 appeal to this Court.

"It is contended on behalf of the Appellants that under Dadabhoy's will Pallonji did not take an absolute interest in the moiety of the estate given to him, that he had only a right to enjoy the income of the moiety till his natural born son attained the age of majority, and that on the happening of that event the son would be entitled to take possession of the moiety.

"It was further contended for the Appellants that as no son was born to Pallonji, Byramji (Defendant 2) was given as a Palak son to Pallonji and as such was entitled to the whole of Pallonji's half share in the same way and on the same conditions as his natural born son, if he had had any.

"Lastly it was contended that Defendant No. 1 had not been in management of Pallonji's share as an express trustee, and that the suit was therefore governed by Article 120 and not by sec. 10 of the Limitation Act (XV of 1877).

"At an early stage of the argument we expressed our opinion that the suit was not barred by limitation, as Jehangirji was not only an executor, but also a trustee in whom a moiety of the estate was vested in express trust for the benefit of Pallonji, and that the case fell within the purview of sec. 10 of the Limitation Act.

"The case entirely turns on the construction of Dadabhoy's will. The material portions of the will bearing on the questions at issue are paras. 2, 3, 5, 8, and 11.

"The first question to be determined is, what interest does Pallonji take in the property bequeathed to him?

"Para 2 provides—'the name of the elder son is Pallonji, the name of the younger son is Jehangirji. The said two sons are proprietors half and half alike and in equal shares of my whole estate, outstandings, debts, title and interest'

"Under this clause it is perfectly clear that Pallonji took an absolute estate in one moiety of the testator's property. Sec. 82 of the Indian Succession Act provides—'where property is bequeathed to any person, he is entitled to the whole interest therein of the testator, unless it appears from the will that only a restricted interest was intended for him.' This is also the rule laid down in the Tagore Will case [*Tagore* v. *Tagore* (1)], where their Lordships of the Privy Council observe that 'where an estate is given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu Law (as under the present state of law it does, by will in England) an estate of inheritance.' Applying this principle to the present case, there is no doubt whatever that Pallonji took an absolute interest in the property given to him by Clause 2 of the will. Is there anything in the rest of the will to control or restrict this absolute interest? Clause 3 provides--'none of my heirs have power in any way to mortgage or sell or give in gift or in charity, etc., or to dispose of in any other way whatsoever the immoveable and moveable estate belonging to me, the testator, which there is or may be according to (my) books and according to the partition, etc., the half share of the

(1) L. R. I. A. Sup 65: s c 18 W. R. 365 (1872).

Inam Khoti Watan village of Velgam appertaining to my share. Both the heirs are to take care of the said estate and look after it and both the heirs living together are duly to enjoy the balance which may remain after payment of the Government assessment.' Clause 8 further provides:—'If any of my heirs after my death carry on any trade or business of any nature whatsoever, and if a loss or deficiency occur therein, the risk on account thereof (shall) be on the heir (so) trading. The claims or demands of the creditors in regard to the same shall not avail at all against my estate. The whole of my estate is given by me for the maintenance of my heirs and their descendants.'

"These clauses undoubtedly place restrictions on the powers of enjoyment, alienation, and disposal of the property given to both Pallonji and Jehangirji. But such restrictions being repugnant to the absolute gift already made under Clause 2 of the will are invalid and inoperative and opposed to law. In *Ashutosh Dutt* v. *Durga Churn Chatterjee* (2), the testatrix by her will provided *inter alia* as follows: 'This property of mine will not be liable for the debts of any person. None will be able to transfer it None will have the rights of gift and sale.' The Privy Council held that these restrictions on alienation 'being inconsistent with the interest given were wholly beyond her power and must be rejected as having no operation.' Mr. Shah contends that reading Clause 5 with Clauses 3 and 8 it was the intention of the testator not to confer an absolute estate on Pallonji, but to give him only a right to enjoy the income of one-half of the estate subject to the control and management of his younger brother Jehangirji. It is urged that he must live with his brother and enjoy the income, but has no right to separate possession, enjoyment and partition of his share. In support of this contention Mr. Shah relies on the words in Clause 3—'Both the heirs are to take care of the said estate and look after it and both the heirs living together are duly to enjoy the balance which may remain after payment of the 'Sarkar's assessment,' and in Clause 8—'The whole of my estate is given by me, the testator, for the maintenance of my heirs and their descendants,' in Clause 5 —'Therefore he (Jehangirji) is to carry on according to my testamentary (writing) the whole management by his true and pure integrity and both the heirs are equally to enjoy half and half alike the whole estate with unanimity with my elder son Pallonji in such a way as not to injure his (Pallonji's) rights.' It appears to me that these directions about the mode of enjoyment of the property given to Pallonji and Jehangirji are inconsistent with the absolute gift to both and therefore void under sec. 125 of the Indian Succession Act. See also *Haliberton* v. *The Administrator-General, Bengal* (3), *Lala Ram Jewan Lal* v. *Dal Koer* (4), and *Rai Kishori Dasi* v. *Debendra Nath* (5).

"It was next argued for the Appellants that whatever interest Pallonji took under the will, it was liable to be defeated, when a son was born to him and attained the age of majority or failing the natural born son when a Palak son was given to him. In either of these contingencies, it was urged, a moiety of the estate would pass either to the natural born son or to the Palak son. Reliance was placed on the following passages in the will:—'Therefore if my elder son gets male issue, half of the estate is to be made over to him on his attaining full age' (Clause 5). 'If a son be born of the body of Pallonji, he (shall) on his attaining his full age be the owner of a half share in the whole of the immoveable and moveable estate belonging to me. My heir, (and) Vakil (or executor), Jehangirji or his heirs shall raise no objection to give him the share. If they raise any objection, the responsibility arising therefrom is on their heads. All the clauses written in this will are applicable to the said son of (his) body.' (Clause 11.) There can be no doubt that the effect of these passages is to make the absolute gift to Pallonji defeasible in the event of his having a son, and that son attaining majority. But as that event did not occur, the absolute gift became indefeasible. That being the case, Pallonji's half share of the estate would pass on his death to his heirs and next of kin.

(2) L. R. 6 I. A. 182 at p. 186 (1879).

(3) I. L. R. 21 Cal. 488 (1894).
(4) I. L. R. 24 Cal. 406 (1897).
(5) L. R. 15 I. A. 37 (1887).

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"But it is urged that Byramji was given as a Palak son to Pallonji on the 3rd day after his death and that as such he is entitled under para. 11 of the will to the same rights as the natural born son. It is contended that the Palak stands on the same footing as the natural born son and that the executory devise in favour of Byramji took effect on Pallonji's death. In support of his contention Mr. Shah relies on the following passage—'If my son Pallonji does not get a son, my son Jehangirji is to give his son as Pallonji's Palak. All the clauses of the will are applicable to the said Palak son.' In this passage there is no doubt a direction to Jehangirji to make his son a Palak son to Pallonji. But there is no express gift either to Byramji or to the Palak son in this passage or in any other part of the will. A gift is sought to be spelt out of the words, 'All the clauses of the will are applicable to the said Palak son.' These words are in the first place too vague to be susceptible of the interpretation put upon them. The same words are used in respect of the natural born son. It is difficult to say with precision what the testator really meant by these words. But an explanation is offered by Mr. Taraporewala for the Respondents who has argued the case with great care and ability that these words refer to the restrictive Clauses 3 and 8. It appears from the will read as a whole that the dominant idea in the testator's mind was that his estate should go down to his descendants unimpaired and undiminished and free from all claims on the part of his relatives or strangers to the family. For this purpose he places every possible restriction on the power of alienation and enjoyment of the property, and these restrictions apply not only to his sons and heirs, but also to Pallonji's wife, daughter, or any other person claiming through Pallonji. It is therefore reasonable to suppose that he intended that Pallonji's son, whether natural born or Palak, should be placed under the same restrictions. But whatever be the precise meaning of these words, it is difficult to infer from them that any gift was made to the Palak son. It may be that the testator intended to make a gift to the Palak son, but he has not said so. 'The question is,' as Lord Wensleydale observes in *Bullock* v. *Downes* (6), 'not what the testator meant, but what is the meaning of the words used.' This is the established rule of construction. There are no words to be found in the will to indicate a gift to the Palak son. Byramji's name is not even mentioned. I am therefore of opinion that there is no legacy given to Byramji either as a *persona designata* or as a Palak son.

"Even assuming that there was an executory bequest to Byramji as a Palak son, the bequest would be void under sec. 111 of the Indian Succession Act. The bequest to the Palak son is to take effect on the happening of an uncertain event, namely, if no son was born to Pallonji. No time is mentioned in the will for the occurrence of this event. The bequest would therefore be void unless such event happened before the period of the payment or distribution of the fund bequeathed. So long as Pallonji was alive there was a possibility of his having male issue, and until his death without male issue there was no chance of Byramji becoming a Palak son It follows therefore that the event on the happening of which the legacy to Byramji was to take effect did not occur before the testator's death which would ordinarily be the period of payment or distribution of the fund bequeathed. But Mr. Shah relies on *Edwards* v. *Edwards* (7), and *O'Mahoney* v. *Burdett* (8), and contends that the period of distribution in the present case would be either the time when the natural born son of Pallonji came of age, or the death of Pallonji when Byramji was made his Palak son. But it is to be observed that according to the second rule laid down in *Edwards* v. *Edwards* (7), relating to executory bequests such as we are considering in the present case, and afterwards affirmed by the House of Lords in *O'Mahoney* v. *Burdett* (8), the event on which the gift over is to take effect may happen at any time either before or after the testator's death. This rule is not adopted by the Indian Legislature in sec. 111 of the Succession Act according to which the contingency must occur before the period of distribution. Mr. Shah contends that in the present case the period of distribution

(6) 9 H. L. C. 1 (1860).
(7) 15 Bev. 357 (1852).
(8) L. R. 7 H. L. C. 388 (1874).

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should be taken to be the time of Pallonji's death; he says that though Byramji was in fact given as Palak on the 3rd day after Pallonji's death, his rights relate back to the date of Pallonji's death. No authority is cited in support of this proposition and none can be found. I am of opinion that in this case the period of distribution should be taken to be the death of the testator. See *Norendra Nath Sirkar* v. *Kamalbasini Dasi* (9), where their Lordships of the Privy Council observed—'To search and sift the heaps of cases on wills which cumber our English Law Reports in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life seems almost absurd. In the Subordinate Courts of India such a practice, if permitted, would encourage litigation and lead to idle and endless arguments. The Indian Legislature may well have thought it better in certain cases to exclude all controversy by positive enactment. At any rate in regard to contingent or executory bequests the Succession Act, 1865, has laid down a hard and fast rule, which may be applied, wherever it is applicable, without speculating on the intention of the testator.'

"I therefore hold that even assuming that there was a gift to Byramji as a Palak son, it would be void under sec. 111 of the Indian Succession Act."

Mr. L. DeGruyther, K.C. (with him *Mr. Horace Miller*), for the Appellants, submitted that according to the true construction of the Will, Pallonji did not take an absolute interest, but only a defeasible interest. The Courts below were wrong in holding that there was no gift under the Will to Byramji. The conclusions of the Subordinate Judge in regard to the usage among Parsis of making adoptions and the effect in law of such adoptions when made were erroneous. Adoption in the sense of nomination of a son or heir was a well recognized institution among the Parsis. In fact there have been several adoptions in this family. Reference was made to "The Parsees", by Dosabhoy Framjee (1865), London.

In construing the Will of a Parsi written in Gujrati the Court ought to place a liberal construction upon it, and ought to put itself in the testator's position and look at the Will from his point of view: *Chunilal Parvatishankar* v. *Bai Samrath* (10) and *Narasimha* v. *Parthasarathy* (11). There were ample indications in the Will to show that the testator desired to benefit the adopted son or "palak" and intended to place him in the same position as a natural son, and to retain the estate in his own family, thereby excluding the females. *Secondly*, the gift to Byramji was not void under sec. 111 of the Indian Succession Act, X of 1865. The section was a reproduction of *Edwards* v. *Edwards* (7). Applying that case and the case of *O'Mahoney* v. *Burdett* (8), the period of distribution in the present case would be either the time when the natural born son of Pallonji became of age or when Byramji was made his adopted son. The section had no application where time was distinctly specified in the Will, that is the death of the testator here. In order to apply the section there must be no time fixed in the Will. If the section applied, it would invalidate the legacy to the natural son as well, which would be certainly contrary to the Will. The Appellant based his case, not on the ceremony of adoption which for certain purposes may begin from the third day after death, but on substitution.

[LORD DUNEDIN.—In the case of

(9) I. L. R. 23 Cal. 563: s. c. L. R. 23 I. A. 18 (1896).

(7) 15 Bevan 357 (1852).
(8) L. R. 7 H. L. C. 388 (1874).
(10) I. L. R. 38 Bom. 399: s. c. 18 C. W. N. 844 (1914).
(11) 18 C. W. N 554: s. c. I. L. R. 37 Mad. 199 at p. 221 (1913).

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Norendra Nath Sirkar v. *Kamalbasini Dasi* (9) Lord Macnaghten held that sec. 111 applied to executory bequests. Won't it then apply to bequest by substitution as well?]

I submit, not. When the fund is distributable after the testator's death then the section was inapplicable. The case of *Norendra Nath Sirkar* v. *Kamalbasini* (9) was precisely the case put in Illus. (*b*) to the section. As to the rules regulating the construction of a Will reference was made to Jarman on Wills (1910), 1st Vol., p. 452, and Vol. II, p. 2209; *Hunoomanpersaud Panday* v. *Mussamat Babooee Munraj Koonweree* (12). *Thirdly*, the claim as to the moveables was barred by limitation. Although the action was in form for administration, it was in reality one for possession. Sec. 10 of the Limitation Act applied to an express trust for a specific purpose and the suit must be brought by the beneficiary. The Appellants are not trustees and under sec. 28 of the Limitation Act, IX of 1908, after the expiry of the period of limitation, not only the remedy but also the right to the property was extinguished. The cause of action accrued in 1897 and the period was six years for the recovery of moveables: *Mahomed Riasat Ali* v. *Mussamat Hasin Banu* (13).

Sir Robert Finlay, K.C., and *Mr. G. R. Lowndes* for the Respondents submitted that there was no gift to Byramji under the provisions of the Will. Possibly there was an inchoate desire to benefit him, but the general words actually used in the Will did not amount to a devise. Pallonji took an absolute and not a defeasible interest under the Will. In any case the gift to Byramji was void under sec. 111. The section applied to all contingent bequests whether executory or by substitution and to all kinds of property. There could have been no adoption till three days after the death of the testator, and the estate would therefore remain in abeyance. Reliance was placed on *Sreemutty Soorjeemoney Dossey* v. *Denobundoo Mullick* (14) and *Norendra Nath Sirkar* v. *Kamalbasini Dasi* (9).

The claim was not barred by limitation as Jehangirji himself admitted that he was a trustee carrying on business for the benefit of Pallonji's heirs according to the provisions of the Will.

Mr DeGruyther replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW —This is an appeal from a decree of the High Court of Judicature at Bombay, dated the 9th December 1910. The High Court affirmed a decree of the Subordinate Judge of Thana, dated the 2nd April 1910.

The case has reference to the construction of a Will executed by one Dadabhoy Byramji on 8th August 1866. By this Will the testator narrated that of his three sons then living he has given one in adoption to a paternal uncle. His other two sons were named Pallonji and Jehangirji. The material portions of the Will disposing of the "estate" are these:—

"The said two sons are proprietors, half and half alike, and in equal (shares), of my whole 'estate,' outstandings, debts, title, and interest . . . Both the heirs are to take care of the said 'estate' and look after it, and both the heirs living together are duly to enjoy the balance which may remain after payment of the Sarkar's assessment. . . . In this my testamentary

(9) I. L. R. 23 Cal. 563: s. c. L. R. 23 I. A. 18 (1896).

(12) 6 M. I. A. 393 at p. 411 (1856).

(13) L. R. 20 I. A. 155 (1893).

(9) I. L. R 23 Cal 563: s. c. L. R. 23 I. A. 18 (1896).

(14) 9 M. I. A. 123 at p. 135 (1862).

writing I the testator have appointed my two sons as (my) heirs."

The Will then states that Pallonji, the elder, a man then of about 39 years of age, was in a confused state of mind, and that the other son Jehangirji was accordingly entrusted with the management of the "estate"

"by his true and pure integrity, and both the heirs are to equally enjoy half and half alike the whole 'estate' with unanimity with my elder son Pallonji in such a way as not to injure his (Pallonji's) rights."

Up to this point in the Will there can be no doubt whatsoever that the property of the estate was effectually and equally divided between these two sons. There then follow, however, the clauses which are said to create difficulty. They are these :—

"At present my elder son Pallonji has no male issue of his body. (He) has only a daughter. Therefore, if my elder son Pallonji gets a male issue, half of the 'estate' is to be made over to him, on his attaining (his) full age."

And it may be proper that the 11th clause of the Will should be quoted in full. It reads thus :—

"I, the testator, have in the second clause of this will appointed my two sons Pallonji and Jehangirji as my heirs. The wife of Pallonji, the elder of them, has now gone to her father's house. On her return, if she, by instigating her husband, or by any (other way) cause to be mortgaged, sold, given in gift, charity, etc., or disposed of, whatsoever in any way to any one, any immoveable and moveable 'estate,' etc., appertaining to the half share during the lifetime of my son Pallonji or, after his death, which God forbid, my son Pallonji or his wife, or daughter, or any (other) person (shall) as stated in the third clause of this will have no authority, power and right so to do. If my son Pallonji does not get a son, my son Jehangirji is to give away his son as Pallonji's Palak (or his adopted son). All the clauses of this will are applicable to the said adopted (son). If a son be born of the body of Pallonji he (shall) on his attaining (his) full age be the owner of half share in the whole of the immoveable and moveable 'estate' belonging to me. My heir, (and) Vakil (or executor), Jehangirji, or his heirs shall raise no objection to give him the share. If they raise any objection, the responsibility arising therefrom is on their heads. All the clauses written in this will are applicable to the said son of (his body)."

The material facts of the case are that the testator having executed this Will on 8th August 1866 died within a fortnight thereafter, *viz.*, on 21st August 1866. He was survived by his two sons. Pallonji, the elder, was of weak intellect as the Will indicates. Jehangirji entered upon the management of the whole estate, having obtained probate of the Will in 1867. This state of matters lasted for 30 years, *viz.*, till 1897, when Pallonji died. Pallonji was twice married but had no son. He left a widow and other representatives who are Respondents in this appeal and are his heirs according to the Parsi Intestate Succession Act. The nature of the suit by these heirs is for an account for an ascertainment of the rights and interests of the parties in the estate and for partition, and the claim is grounded on the right of Pallonji as, it is contended, the owner of one-half of the estate from the date of the testator Dadabhoy's death.

One other fact may now be mentioned, *viz.*, that it is alleged that on 3rd December 1886, Pallonji adopted, as his Palak, Byramji, his nephew, and son of Jehangirji. Jehangirji and his son Byramji resist the suit, maintaining that Byramji, as Palak, or adopted son of Pallonji, succeeds in terms of the settlement to the half of the estate which Pallonji so long enjoyed. It is, of course, also maintained that under the terms of the settlement Pallonji never was owner of the one-half of the estate, or, as it would be expressed in English

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phraseology, the terms of the Will were such as to prevent vesting in Pallonji.

The learned Judges of the Court below have not only dealt with this question but with certain others, including the special situation of Byramji as Palak of his uncle. The points among others discussed were (1) whether such a Palak could ever take under the Will, looking to the fact that it remained uncertain until Pallonji's death that the condition of a Palak taking could ever be purified, *viz.*, that Pallonji should die without a son, and (2) the peculiar point as to the office of a Palak to a Parsi becoming effectual only three days after the adoptive father's death. (3) A further question was keenly argued, *viz.*, whether the Will contained in itself sufficient words of grant or gift to the Palak.

In the view taken of this case by their Lordships these questions, however interesting, are not necessary for the decision about to be pronounced. For their Lordships are clearly of opinion that under the terms of Dadabhoy Byramji's Will one-half of the estate conveyed vested in Pallonji a *morte testatoris*. The result of the argument presented would be that if Pallonji had had a son who reached 21 during his father Plaintiff's life, then in that event that son would have taken so as to cut out Pallonji from all rights under this Will. The right of Pallonji would accordingly be restricted to that of enjoyment, not even for life, but until the majority of his own son. Their Lordships cannot agree with such a construction.

The destination over to a son, who should take upon attaining 21 years of age, would appear to their Lordships to be language appropriate to the events of the death of Pallonji during the lifetime of the testator and of his having left a son -- the situation also being provided for of that son being at that period of time under 21.

But when the father Pallonji himself survived the testator it does not appear to their Lordships that there are any words in the Will sufficient to cut down the right of Pallonji to one-half of the estate to a tenancy for life therein, or for a less period, according to the argument. On the contrary, the words employed seem to fit the case of the entire estate being on the testator's death divided into two portions, and of each portion becoming then the absolute property of one of the two sons.

While these are the general principles which would be applicable in the construction of such a Will, in their Lordships' opinion the same result is precisely reached by the application of sec. 111 of the Indian Succession Act. Their Lordships agree with the view that has been taken as to the applicability of that section in the Courts below. No further question, this being so, need be dealt with.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the Appellants will pay the costs.

Solicitors : *Messrs. T. L. Wilson & Co.*, for the Appellants.

Solicitors : *Messrs. Ranken, Ford, Ford & Chester* for the Respondents.

B. D. *Appeal dismissed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 1 OF 1914.

CHAUDHURI, J. 1914, 20, July. } IN RE BALCHAND SURANA, Insolvent.

Indian Insolvents Act (11 and 12 Vict, ch. 21), sec. 86—Judgment entered up under the above section—Insolvent absent.

After due notice being served by the Official Assignee, an insolvent failed to

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appear at the hearing. Judgment was entered up against the insolvent under sec. 86 of the Indian Insolvents Act.

One Balchand Surana was carrying on a business in piece-goods in the Pagayaputty in Calcutta in co-partnership with one Hazarimull Surana under the name and style of Messrs. Balchand Surana. On 21st August 1900, Balchand filed his petition in insolvency and filed his schedule on 5th February 1901. The other partner Hazarimull filed his petition in insolvency on 21st February 1901, when the usual vesting order was made, and the two matters were amalgamated under the direction of the Court. These matters came on for hearing on 11th February 1905, when Hazarimull got his discharge, but Balchand did not appear to get his discharge.

The matter rested at that stage for a long time when one Koramull Boocha brought a suit against Balchand in the High Court being Suit No. 409 of 1914, and it was discovered from the affidavit of the said insolvent Balchand filed in that suit that "he had been acting as a broker of many respectable firms for a long time and was paying a license of Rs. 50 a year and that besides acting as such broker he had started a business of commission agents and as such agent he had to deal annually with goods within about 8 to 10 lacs and that he had properties in Bikanir worth many times over the alleged claims of the Plaintiff and it was wholly unfounded that he should not be in a position to meet any claim of the Plaintiff, if he would be able to substantiate any." All this time Balchand and Koramull were working as brokers in co-partnership and Balchand had filed a suit in the Small Cause Court of Calcutta being suit No. 4061 of 1914, for the recovery of Rs. 561-4 due to him for brokerage against one Harruckchand.

A creditor in collusion with Balchand filed a petition before Chitty, J., to dismiss the insolvency matter so that Balchand may get the amount from the Small Cause Court, when the decree would be made. The petition was withdrawn on the opposition of one of the creditors.

A similar petition was made by another creditor Matichand Tatkamull in collusion with Balchand, before Chaudhuri, J., on the 24th June 1914, and it was pointed out that it was not in order, as no notice of the application was given to the creditors and none but the insolvent had the right to make such application.

The matter was adjourned to 7th July, and it was directed that notices should be given to the creditors in the meantime. When the matter came up on the 7th July, it was urged on behalf of one of the creditors that the petition should not be dismissed at that stage, but a decree should be passed against the insolvent, as according to his own statement in the affidavit mentioned above, he had sufficient assets in his hands to pay his debts in full. The Court was of opinion that the Official Assignee was the proper party to move the Court for a decree, and accordingly an application was made by the Official Assignee.

Mr. S. R. Dass appeared on behalf of the Official Assignee and submitted that the insolvent persistently refused to appear in spite of the notice of the Official Assignee sent to him by registered post. Then he cited the cases—*In re C. R. English* (1), and *In re M. G. Costello* (2)—and asked for the order to enter up judgment against the insolvent under the sec. 86 of the Indian Insolvent Act.

(1) 7 C L. R. 878 (1880)
(2) 8 B. L. R. App. 57 (1872).

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The JUDGMENT OF THE COURT was as follows :—

CHAUDHURI, J.—Let the judgment be entered up against the insolvent Balchand Surana in this Court in its Original Jurisdiction in the name of the Official Assignee for the amount of the debts mentioned in the Schedule filed herein, and costs of this application be paid out of the assets of the estate.

Messrs. Newgie & De, Attorneys for the Official Assignee.

P. D.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 1693, 3087 AND 3088 OF 1912.

D. CHATTERJEE, J.	AMATOO, Defendant,
WALMSLEY, J.	1st Party, Appellant,
1914,	*v.*
Heard, 20 and 28, August.	SHEIKH MUKSUD ALI, Plaintiff,
Judgment, 31, August.	Respondent.

Merger, doctrine of—Application to tenures in India—Equitable considerations—Transfer of Property Act (IV of 1882), sec. 111 (d) (f).

The predecessors of the Defendants, who held a malguzari *tenure directly under the 16 as. zamindar, afterwards took a* mokurari *lease from the* putnidar *under 8as.-1gd. maliks.*

Held—*That the conditions which would make sec. 111, cl.* (d), *or sec. 111, cl.* (f), *of the Transfer of Property Act, applicable did not exist in the case and the* malguzari *interest did not merge in the* mokurari *either under these provisions or under the general law.*

The English doctrine of merger has never been held to apply to land tenures in India in their entirety. On the other hand very eminent Judges have doubted that it does.

WOOMESH CHANDRA GOOPTO *v.* RAJ NARAIN RAY (1) AND JIBANTI NATH KHAN *v.* GOCOOL CHANDRA CHOUDHURI (2), *referred to.*

RAJA KISHEN DATT RAM *v.* RAJA MUMTAZ ALI (4) *was not decided on the ground of merger.*

In PROMATHO NATH MITTER *v.* KALI PRASANNA CHOUDHURY (5), SURJA NARAIN MANDAL *v.* NANDA LAL SINHA (6) AND ULFAT HUSSAIN *v.* GAYANI DASS (7), *apart from the application of sec. 111, cl.* (d), *of the Transfer of Property Act, there was no equitable consideration to prevent the merging of rights, whereas in the present case there was no equitable consideration to attract the application of the doctrine of merger.*

In deciding whether there is a merger in equity what must be first looked at is the intention of the parties and if that be not expressed, then the Court looks to the benefit of the person in whom the interests coalesce.

GOKALDAS GOPAL DAS *v.* PURAN MAL (8), *referred to.*

This was an appeal preferred on the 28th June 1912 against the decree of T. C. Mukerjee, Esq., District Judge of Zilla Purnea, dated the 30th April 1912, reversing the decree of Babu Raj Kishore, Munsif at Kishoreganj, dated the 26th July 1911.

The facts of the case material to this report will appear from the judgment.

Dr. Rash Behary Ghosh and *Moulvi Nuruddin Ahmed* for the Appellant.

Babus Dwarka Nath Chuckerbutty,

(1) 10 W. R. 15 (1868).
(2) I. L. R. 19 Cal. 760 (1891).
(4) I. L. R. 5 Cal. 198 (1879).
(5) I. L. R. 28 Cal. 744 (1901).
(6) I. L. R. 33 Cal. 1212 (1906).
(7) I. L. R. 36 Cal. 802 (1909).
(8) I. L. R. 10 Cal. 1035 (1884).

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Jogendra Nath Mukerjee, Nanda Lal Banerjee and *Moulvi A. K. Fazlal Huq* for the Respondent.

Babu Biraj Mohan Majumdar for the minor Respondent.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff No. 1 is the auction-purchaser at a rent-sale in respect of a *putni taluk* of 8as.-1g. share in Taluqua Jibba Kata Gheringaon. The Plaintiff No. 2 was said to be the real purchaser, Plaintiff No. 1 being his servant and *benamdar*. It was owing to an objection made by the Defendants that they became joint Plaintiffs. It has been held that the *benami* has not been proved : this finding has been very strongly impeached before us, but the finding is one of fact however unsatisfactorily it may have been arrived at.

The Defendants first party are the cultivating raiyats and Defendants second party holders of an intermediate tenure said to have been annulled by the Plaintiff No. 1 under sec. 167 of the Bengal Tenancy Act.

The plea of the Defendants first party was, amongst other things, that they had paid the rent to their landlords, the Defendants second party, and the relation of landlord and tenant did not exist as between themselves and the Plaintiffs.

The Defendants second party pleaded that they had a permanent *malguzari* right granted by the 16-anna proprietors more than 200 years ago in the time of their ancestors and that although the *mokurari* right granted by the defaulting *putnidar* in a recent year might have been annulled, the *malguzari* right could not be and had not been annulled.

The main question in the appeal is whether the *malguzari* right of Defendants second party merged in the *mokurari* right granted by the defaulting *putnidar* and has been annulled with the *mokurari* by the service of notice under sec. 167 of the Bengal Tenancy Act.

The Court of first instance held that as the *malguzari* interest existed long before the creation of the *putni* it was not an incumbrance within the meaning of sec. 161 and had not been annulled by the sale of the *putni* and the notice under sec. 167.

The learned District Judge has upset that decision on the ground that the *malguzari* interest had merged into the *mokurari* interest and the annulment of the *mokurari* was sufficient for the destruction of the rights of the Defendants second party. The learned Judge thinks that sec. 111, cl. (*d*), of the Transfer of Property Act, had the effect of merging the *malguzari* right in the *mokurari* right and even if the Transfer of Property Act had no application, the law of merger applied on general principles and there was a welding of the two rights in one. The correctness of the judgment of the learned Judge has been impeached at various points, but it will be sufficient to deal with the question of merger alone.

The *mokurari patta* granted by the *putnidars* to the Defendants second party is to the effect that "you have been in possession from a very ancient time from the time of your ancestors of a *malguzari* right, etc. ; now at your desire we give you a *mokurari*, etc." So that the ancient *malguzari* rights are recited as existing when the *mokurari* was given. The Defendant in his deposition says he paid a *nazarana* and had the *malguzari* made *mokurari*, *i.e.*, not liable to enhancement. Neither the document nor the deposition shews that any subsisting right was given up. It is probable that the incidents of the ancient *malguzari* right were questioned by the *putnidar* who de-

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manded enhanced rents and some *nazarana* was paid to stop all future claims for enhancement. Supposing that the Transfer of Property Act was applicable to the case, let us see how it favours the case for the Plaintiffs. Sec. 111, cl. (*d*), is—" a lease of immoveable property determines in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right." The lessors of Defendants second party were the zamindars of 16 annas : the *putnidar* was a lessee under 8as.-1g. maliks : supposing that the *putnidar* could be taken as the lessor of the Defendants second party to the extent of 8as.-1g., the entire interest of the *putnidars* did not come into the hands of Defendants second party ; but says the learned District Judge that the *putnidar* gave the *mokurari* and the *mokurari* and the pre-existing *malguzari* came into the same hands. In the first place that would not be an union of the entire interests of the lessor and the lessee in the same hands and in the second place the union would not be in the same right. The difference obviously is that the *malguzari* was granted by the zamindars and would last as long as the zamindary lasted, but the *mokurari* was granted by the *putnidar* and would last as long as the *putni* lasted. These two rights could not possibly coincide all along their length and breadth; sec. 111, cl. (*d*), would not therefore do. The only other provision of the Transfer of Property Act that might be referred to was sec. 111, cl. (*f*) ; that has not however been relied on obviously on good grounds ; that clause is—" A lease of immoveable property determines (*f*) by implied surrender " and the illustration is—a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the existing lease. This is an implied surrender of the former lease and such lease determines thereupon. The same considerations that apply to sec. 111, cl. (*d*), seem to apply here also : the two leases are not conterminous, the lessors of the two leases have different rights—the leases have different lives although some part of their existence might be co-existent. The Transfer of Property Act therefore does not help the Plaintiffs.

The English doctrine of merger in common law has been broken in upon by various statutes from time to time in England, and I think it has never been held that that law in its entirety is applicable to land tenures in India. On the other hand very eminent Judges have doubted that it does. In the case of *Woomesh Chandra Goopto* v. *Raj Narain Ray* (1), Sir Barnes Peacock said, " my own impression is that the doctrine of merger does not apply to lands in the mofussil." In the case of *Jibanti Nath Khan* v. *Gocool Chandra Choudhuri* (2), Pigot and Banerji, JJ., said, " no authority has been shewn us for holding that the doctrine of merger applies to such cases as this in India, that is, that a *putni* interest must merge in the zamindary interest if they come into the same hands and we do not think that we should, for the first time, so far as we are aware, apply the doctrine to such a case." Then in the recent case of *Lal Mahomed Sarkar* v. *Jagir Sheikh* (3) (Sir Lawrence Jenkins, C. J., and Mookerjee, J.), the learned Chief Justice said—" It is at least doubtful whether the doctrine of merger applies to lands in the mofussil." Reliance is placed however on several other cases which it is said help the Plaintiffs and on some of which the learned District Judge has relied in this case. The main spring of these later cases seems to be the decision of the Privy

(1) 10 W. R. 15 (1868)
(2) I. L. R. 19 Cal. 760 (1891).
(3) 13 C. W. N. 913 (1909).

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Council in the case of *Raja Kishen Datt Ram* v. *Raja Mumtaz Ali* (4). That was a case in which the mortgagee acquired certain *birt* tenures existing within the mortgaged Taluqua on very favourable terms and treated them as merged in the *taluk*: the mortgagor was allowed to redeem the whole *taluk* including the *birts* on paying the mortgage-money and the purchase-money of the *birts* as compensation. This case was decided on the ground that the mortgagee had taken advantage of his position as such to acquire the *birts* upon very inadequate consideration and had not treated the *birts* as surviving. If the case had been decided on the ground of merger, the mortgagor would not have been compelled to pay the purchase-money paid by the mortgagee as a condition precedent to the redemption. Their Lordships made a remark—"Had they (the purchases of the *birts*) been made by or on behalf of a *talukdar* holding under an absolute, as distinguished from a mortgage, title, the tenures would as a matter of course have merged in the *taluk*."

In the case of *Promatho Nath Mitter* v. *Kali Prasanna Choudhury* (5), Maclean, C. J., and Banerjee, J., held that when a *putni* interest created after the Transfer of Property Act is purchased by the zamindar the *putni* merges in the zamindary under sec. 111, cl. (*d*), of the Transfer of Property Act. Mr. Justice Banerjee, who was a party to the case of *Jibanti Nath Khan* v. *Gocool Chandra Choudhuri* (2), explains the distinction by saying that no reference was made to the Transfer of Property Act in that case. In the case of *Surja Narain Mandal* v. *Nanda Lal Sinha* (6), reference was no doubt made to the remarks of the Privy Council in the case of *Raja Kishen Datt Ram* v. *Raja Mumtaz Ali Khan* (4), but the case was decided on the ground that the acquisition by the mortgagor enured to the benefit of the mortgagee and enhanced his security. In the case of *Ulfat Hussain* v. *Gayani Dass* (7) (Stephen and Vincent, JJ.), the proprietary and the *mokurari* interests were both purchased by one person. All these cases are clearly distinguishable from the present. In all these cases the interests of the lessor and the lessee came into the same hands and apart from the application of sec. 111, cl. (*d*), of the Transfer of Property Act, there was no equitable consideration to prevent the merging of the rights.

In the present case, however, as I have shewn, the provisions of sec. 111 of the Transfer of Property Act do not apply, and there is no equitable consideration which attracts the application of the doctrine of merger.

Mr. Foa in his book on the Law of Landlord and Tenant says, "In deciding whether there is a merger in equity what must be first looked at is the intention of the parties and if that be not expressed, then the Court looks to the benefit of the person in whom the interests coalesce." (Foa, 5th Ed., p. 629.) This doctrine of benefit was laid down by the Judicial Committee of the Privy Council in the case of *Gokaldas Gopal Das* v. *Puran Mal* (8),: "The obvious question to ask in the interests of justice, equity and good conscience is —what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary

(2) I. L. R. 19 Cal. 760 (1891).
(4) I. L. R. 5 Cal. 198 (1879).
(5) I. L. R. 28 Cal. 744 (1901).
(6) I. L. R. 33 Cal. 1212 (1906).
(4) I. L. R. 5 Cal 198 at p. 209 (1879).
(7) I. L. R. 36 Cal. 802 (1909).
(8) I. L R. 10 Cal. 1035 (1884).

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rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest." Here there is no *express evidence* that the Defendants second party intended to give up the ancient *malguzari* right. It must be assumed therefore that he intended to keep it, and if he did, the annulment of the subsequent *mokurari* cannot destroy the pre-existing *malguzari* right. In this view of the case I set aside the decree of the District Judge and restore that of the Munsif with costs in all Courts. The learned Vakil for the Respondent says that the appeals other than No. 1693 have been settled; the learned Vakil for the Appellant says he has no instruction on the point, If they have been settled, well and good; if not, they will be decreed with costs.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 221 OF 1910.

FLETCHER, J. RICHARDSON, J. 1914, 1, April.

DURGA PERSHAD and ors., Appellants, *v.* RAGHUNANDAN LAL and others, Respondents.

Will of a Hindu—Indian Succession Act (X of 1865)—Gift over repugnant to previous gift—Sec. 116 of the Succession Act, scope and meaning of—Gift over on the failure of prior bequest when such failure did not occur in manner contemplated by testator.

A Hindu testator governed by the Mitakshara *School of Hindu Law died leaving a Will and leaving him surviving his widow, two daughters and a minor son. The testator also left a brother and the two sons of his brother who were the Defendants. The son of the testator died having survived his mother by a few days. The eldest daughter died in the lifetime of her mother leaving a daughter who died unmarried. The Plaintiffs were the two surviving sons of the other daugther of the testator. The testator by his Will had made his minor son the* malik *of all his properties. The Will provided that he should succeed to and enter upon possession and occupation of the whole of his estate and appointed the widow as the manager and legal guardian of the infant son. After providing for the management of the property during the son's minority the Will provided—" If after my death the said minor son dies, the mother of the said son shall in his stead become the* malik *in possession and occupation when like myself the said Musammat shall acquire all the proprietary powers and all kinds of properties, moveable and immoveable, and after the death of the widow the property was to go to the testator's two daughters in equal shares."*

Held—*That the gift over in favour of the widow in the event of the son dying without having attained majority was not a void gift as being repugnant to the form of the gift that was previously made in favour of the son.*

The provisions of the Indian Succession Act rendered such a gift perfectly good.

That sec. 116 of the Succession Act which merely incorporated the rules of the English Law provides clearly that the gift over shall take effect on the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator. The mere fact that the testator contemplated that if his son died a minor and the widow survived him, she would acquire the property before the two daughters and that that event did not take effect in that order, because the widow predeceased the son did not deprive the

daughters of the benefit of the legacy given to them by the testator.

The gift in favour of the daughters was a valid bequest to them and the Defendants, who claimed as being the next heirs of the testator's son, had no interest in the estate of the testator.

This was an appeal from the judgment and decree of Babu Tarak Nath Dutta Subordinate Judge of Zilla Patna, dated the 27th April 1910.

This was a suit for the construction of the last Will and testament of one Ram Narain Lal.

The Plaintiffs were the sons of Jaidebi Kuar, a daughter of Ram Narain Lal, and the Defendants Nos. 1 and 2 were the sons of Khub Lal, a brother of Ram Narain Lal. Ram Narain Lal was possessed of considerable properties, moveable and immoveable, to the value of more than Rs. 27,000. At the time of his death Ram Narain had a minor son, Tej Narain Lal, a wife, Chhoto Kuar, and two daughters—Jaidebi Kuar, mother of the Plaintiffs, and Bindadebi Kuar, mother of Janki Kuar. Chhoto Kuar died on 10th March and Tej Narain on 19th March 1904. The testator also left a brother and the two sons of his brother who were the Defendants. The eldest daughter of the testator died in the lifetime of her mother leaving a daughter who died unmarried.

The material portion of the Will is set out below:—

"I do, during my lifetime, make by this Will a settlement among (my) heirs to the effect following:—Tej Narain Lal Sahu, minor son of me, the declarant, born of the womb of my wife, Musammat Chhoto Kuar, who is my legal heir according to the Dharmashastra, and who is still a minor, shall be the Malik (owner) and succeed to and enter upon possession and occupation of all goods, *viz.*, houses, gardens, and bungalows, etc., and whatever rights I enjoy shall, after my death, be vested in the said minor son, the heir, and to this no one shall have any objection. So long as the said minor son does not attain majority, Musammat Chhoto Kuar, daughter of Gopal Sahu deceased, who is the mother of the said minor, shall be the manager and legal guardian, and competent to manage the village and Court affairs, and in the event of need of money for the maintenance and education and other expenses of the said minor, the mother of the said minor shall be at liberty to transfer any immoveable property worth about Rs. 1,000 under Rehan, mortgage, or absolute sale deed, and the said deed shall be executed. If by the grace of God, any other son be born of the womb of the said Musammat Chhoto Kuar, he too like his full elder brother shall be the heir and Malik (owner) of my properties in equal half shares, and so long as he too does not attain his majority, the mother of the said minor shall be the manager and guardian competent to manage all the affairs of the minor. If, after my death, my wife Musammat Chhoto Kuar also dies, then Sant Lal, son of Gokhul Sahu, who is my Bhanja (sister's son), shall be the legal guardian of the said minor, and shall look after the village and Court affairs, until the said minor reaches majority; but he shall have no power to transfer any property. If after my death the said son dies, which God forbid, the mother of the said son shall in his stead become the Malik in possession and occupation, when like myself the said Musammat shall acquire all the proprietary powers, and all kinds of properties, moveable and immoveable, left after appropriation by the said Musammat, shall be possessed and appropriated as proprietors by my daughters Musammat Jaidebi Kuar and Bindadebi

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Kuar in equal shares after the death of their respective mothers. If by the grace of God any other daughter be born, she too like the other daughters shall in equal shares be the Malik and the heiress. If, God forbid. any of the daughters dies, her child (*farzand*) shall in her stead become the Malik of her estate, and if such deceased daughter leaves no child (which God forbid), then her share (estate) will be divided in equal shares among the surviving daughters who shall become the Maliks and enter upon possession and occupation thereof, and to this no one shall have any objection of any kind."

Dr. Dwarka Nath Mitter (for *Babu Golap Ch. Sarkar*) and *Babu Rishindra Nath Sarkar* (for *Maulvi Muhammad Mustafa Khan*) for the Appellants.

Babu Surendra Kumar Bose for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This appeal arises out of a suit brought by the Plaintiffs for the construction of the Will of one Ram Narain Sahu, a Hindu, governed by the *Mitakshara* School of Hindu Law, which is dated the 1st July 1890. The testator died on the 1st March 1901 leaving him surviving his widow Musammat Chhoto Kuar, two daughters Musammat Bindadebi and Musammat Jaidebi and an only son Tej Narain. The testator also left a brother and the two sons of his brother, namely, Ganesh Lal and Raghunandan Lal who are the Defendants in the suit. The son of the testator, namely, Tej Narain, died some time in March 1904, having survived his mother Musammat Chhoto Kuar by a few days. The eldest sister of Tej Narain, that is, the testator's eldest daughter died in the lifetime of her mother Musammat Chhoto Kuar, namely, on the 15th June 1903. She left a daughter Musammat Janki Kuar who died in 1906. No question arises as to the interest that Janki Kuar might take, because it is the common case of both the parties that, if Janki Kuar took any interest under the Will, the Plaintiffs would take in the usual course of succession any interest that Janki Kuar had taken, as she died apparently unmarried and without any children. The two Plaintiffs in this case are the two surviving sons of the other daughter of the testator, namely, Jaidebi, the third son having died in February 1904 and, therefore, he could not take any interest under the terms of the Will. The Will of the testator is in these terms :—The testator proceeds, in the first place, to make his son Tej Narain Lal Sahu who is described therein as his minor son and his legal heir the Malik of all his properties, and the Will states that he should succeed to and enter upon possession and occupation of the whole of his estate. Then the testator proceeds to appoint his widow Chhoto Kuar as the manager and legal guardian of the infant. Then the testator deals with the contingency which did not happen, namely, the contingency of any other son being born to him. Next he deals with the case of the wife predeceasing the son before he attains the age of majority and he appoints in that case another person to be the guardian of the infant Tej Narain. It is quite clear that, down to this, the Will contemplates the case of Tej Narain being an infant and the management of the property during his infancy. Then comes the gift which the present appeal turns on. The clause runs thus :—"If after my death the said minor son dies, which God forbid, the mother of the said son shall in his stead become the Malik in possession and occupation, when like myself the said Musammat shall ac-

quire all the proprietory powers and all kinds of properties moveable and immoveable." Now, the learned Judge considered that, that gift over in favour of the widow in the event of the son Tej Narain dying without having attained majority was a void gift as being repugnant to the form of the gift that was previously made in favour of Tej Narain. That is wholly an unarguable proposition. The gift over to a person in the event of the minor legatee not having attained full age has been supported in a large number of decisions both in the Courts in India and elsewhere. As a matter of fact, the learned Judge considered that, under sec. 111 of the Indian Succession Act, there was so specified uncertain event. The specified uncertain event in this case was the failure of Tej Narain to attain his majority. It is quite clear that the provisions of the Indian Succession Act render such a gift perfectly good. Then, after the death of the widow, the property was given by the testator in equal shares to his two daughters Bindadebi and Jaidebi. The learned Judge considered that, that gift was void on the ground that it was dependent on the gift in favour of the mother and that, as the mother predeceased the son, the gift over in favour of the daughters did not take effect. Sec. 116 of the Indian Succession Act which merely incorporates the rules of the English Law provides clearly that the gift over shall take effect on the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator. The mere fact that the testator contemplated that, if his son died a minor and the widow survived him, she would acquire the property before the two daughters and that that event did not take effect in that order, because the widow predeceased the son, does not deprive the two daughters of the benefit of the legacy given to them by the testator. Sec. 116 is quite clear as to that. In my opinion, the learned Judge came to a wrong conclusion on the construction of the Will. The gift in favour of the daughters, in my opinion, was a valid bequest to them and the Defendants who claim as being the next heirs of Tej Narain have no interest in the estate of the testator. The present appeal ought, therefore, to be allowed and the decree of the Subordinate Judge reversed and the Defendants Nos. 1 and 2 ordered to pay to the Plaintiffs their costs both in this Court and in the Court below. We make no order as to the costs of the Defendant No. 7, who appears to have been added as a formal party. We assess the hearing fee at five hundred rupees.

RICHARDSON, J.—I agree.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE NISI NO. 266 OF 1914.

MOOKERJEE, J.	HEMANTA KUMAR
BEACHCROFT, J.	ROY and another,
1914,	Petitioners,
Heard, 9 and	*v.*
10, March.	BARANAGORE JUTE
Judgment,	FACTORY COMPANY,
1, April.	Opposite Party.

Temporary injunction, when should be granted—Status quo, *maintenance of*—*Indian High Courts Act (24 & 25 Vict., c. 104), sec. 15*—*Jurisdiction of the High Court to interfere.*

The Plaintiffs were some of the superior landlords of the disputed property which consisted of two plots of land and claimed to have been in direct possession of about one-third of the property. The Defendants who were in occupation of the remainder being alleged to have obtained a permanent lease from some of the co-sharers of the Plaintiffs commenced to dig the foundations for an extension of their

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factory house. The Plaintiffs sued for partition and applied for a temporary injunction. The Defendants notwithstanding notice of the application for injunction expedited the erection of the building. It appeared that on partition the Plaintiffs could not conveniently be allowed any share of one of the plots, but must be limited to an allotment out of the other plot.

Held—*That there was a substantial question in controversy between the parties and pending its determination the* status quo *should be maintained to the necessary extent.*

That it was desirable that the plot a share of which only could be allotted to the Plaintiff on partition should be retained in statu quo *so that the Court might be free to grant such relief as it might think proper and an injunction should be granted restraining the Defendants from building on this plot for a period of one month during which the partition suit was to be tried out.*

That it was open to the High Court to give the necessary directions under sec. 15 of the Indian High Courts Act and in a case of this description it was essential that the High Court should interfere to prevent what might otherwise place one of the litigating parties in an unfairly advantageous position and thus turn out in the end to be the cause of an irremediable injustice to the other.

This was a Rule granted against a decision of H. Walmsley, Esq., District Judge, 24-Parganas, dated 21st February 1914, confirming that of Babu Bhagabati Charan Mitra, Subordinate Judge, 24-Parganas, dated 5th February 1914.

The material facts are set out in the judgment.

Mr. S. P. Sinha and *Babu Surendra Chandra Sen* for the Petitioners.

Messrs. Pugh and *Gregory* and *Babu Manmathanath Mukherje* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

We are invited in this rule to consider the propriety of an order by which the District Judge, in concurrence with the Subordinate Judge, has refused an application for the grant of a temporary injunction during the pendency of a suit for partition of joint immoveable property.

The case for the Plaintiffs is that they are some of the superior landlords of the disputed property; that the Defendant company have obtained a permanent lease of a two-thirds share of the property (which comprises two plots) from some of the co-sharers of the Plaintiffs : that the Plaintiffs have been in direct possession of a portion, corresponding approximately to one-third of the property; and that the Defendants, who were in occupation of the remainder, have commenced to dig the foundations for an extension of their factory house. The Plaintiffs allege that they protested against the action of the company and that negotiations for an amicable settlement have failed. They have consequently been driven to sue for partition, in order to effect a division of the two plots of land as between themselves on the one hand, and the Defendant company on the other. Immediately after the institution of this suit, the Plaintiffs applied to the Subordinate Judge for the issue of a temporary injunction to restrain the Defendant company from proceeding with the erection of the extended factory house during the pendency of the litigation. The Plaintiffs allege that although the company had notice of this application, they expedited the erection of the premises.

The application was heard by the Subordinate Judge, who came to the conclusion that the injunction should be refused, as the company which had arranged to erect valuable machinery in the new buildings might be seriously prejudiced by delay. He added that any inequality in the distribution of land at the time of partition might be compensated by a money-payment to the Plaintiffs. He further stated that this order was made, as the Defendant company undertook to build at their own risk.

The Plaintiffs appealed to the District Judge. He agreed with the Subordinate Judge, that in all the circumstances of the case, the injunction should be refused. But before him it was pointed out by Counsel for the Defendant company, that they could not understand the precise meaning of the expression used by the Subordinate Judge in his judgment, namely, that "the Defendants undertook to build at their own risk." The District Judge thereupon held that the application for an injunction must be refused absolutely, and not conditionally upon the Defendants undertaking to build at their own risk. This order we are now invited to set aside at the instance of Plaintiffs.

A sketch of the locality has been produced before this Court, and it transpires from an examination of it, that the disputed property consists of two parcels of land, and that the Defendant company have left vacant on the roadside an area of 7 cottahs, 3 chittacks approximately out of the total area of the two parcels, 1 bigha, 16 cottahs and 8 chittacks. There is a controversy between the parties as to whether the Defendant company have acquired an interest, as permanent lessees, to the extent of two-thirds or five-sixths of the land. If it be assumed that the case of the Plaintiffs is well founded, namely, that the interest of the Defendant company is limited to a two-thirds share, it is plain that the area left vacant would not be sufficient to cover the share of the Plaintiffs. In other words, upon partition, if the Plaintiffs are allotted the vacant portion to the south of the building in course of construction they would not obtain the quantity of land which corresponds to their share.

It has been urged before us on behalf of the Plaintiffs, that if the Defendant company are allowed to proceed with the erection of the building, the result would be that the suit for partition would be practically infructuous, as the Defendant company would inevitably be placed in possession of the portion occupied by their building and the Plaintiffs would have to accept the area left vacant by them. It has been argued that the Defendant company should not be allowed to continue their building operations, as it would mean the determination of the partition suit at their pleasure; and reliance has been placed on the following passage from the judgment of Sir George Jessel, M. R., in *Krehl* v. *Burrell* (1): "If with the notice of the right belonging to the Plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich Defendant is to be entitled to build up a house of enormous proportions at an enormous expense, and then to say in effect to the Court, you will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right, that simply means that the Court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. That would be the real result of such a decision. If I acceded to this view I should add one more to the number

(1) 7 Ch. D. 551 (554) (1878).

of instances which we have from the days in which the Bible was written until the present moment, in which the man of large possessions has endeavoured to deprive his neighbour, the man of small possessions, of his property, with or without adequate compensation." This exposition of the law is applicable to cases in this country: *Benode* v. *Soudaminey* (2), *Dhunjibhoy* v. *Lisboa* (3).

On behalf of the Plaintiffs it has further been urged that, as laid down in *Anand* v. *Parbati* (4), and *Dwijendra* v. *Purnendu* (5), the remedy of the Plaintiffs against their co-owners, or the tenants of their co-owners, is by partition, that they cannot claim relief either by way of ejectment or joint possession, and that if the Defendant company are left free to expedite building operations at their choice, while the Plaintiffs are diligently pursuing the only remedy open to them by way of a partition suit, their rights as co-owners would be essentially defeated.

We are clearly of opinion upon all the circumstances of the case, that an injunction should be granted to a limited extent. [*Israil* v. *Samser* (6).] Upon an examination of the plan, it is fairly clear that, on partition, the Plaintiffs cannot conveniently be allowed any share of the plot marked holding No. 275. They must be limited, unless some very exceptional reason is assigned to an allotment out of the plot marked holding No. 277. It is consequently desirable that this latter holding should be retained in *statu quo* so that the Court may be free hereafter to grant such relief as it may think proper. If the injunction is not granted even to this limited extent, and the Defendant company are left free to hasten the completion of the extensive building which they have undertaken to erect, the distribution of the land in the partition proceedings will no longer be in the unfettered discretion of the Court, but will practically be in their hands. For though instances are known in which a Court has issued a mandatory injunction for the demolition of buildings [*Daniel* v. *Ferguson* (7), *Von Joel* v. *Hornsley* (8)], the reluctance of a Court to take what may be deemed a strong and extreme measure is by no means rare [*Currier's Company* v. *Corbett* (9)]. Indeed, in this very case, the Courts below have already expressed a preference for a considerate treatment of the Defendants. There is a substantial question in controversy between the parties, and pending its determination the *status quo* should be maintained to the necessary extent: *Aynsley* v. *Glover* (10), *Newson* v. *Pender* (11), *Jones* v. *Pacaya* (12).

We accordingly make the rule absolute, discharge the orders of the Courts below, and as stated in the order passed by us on the 10th March 1914 (which will be deemed part of this judgment) grant a temporary injunction restraining the Defendant company from building on the holding No. 277 for a period of one month (during which the partition is to be tried out).

We may add that a question was raised before us as to the competency of this Court to interfere in the exercise of its revisional jurisdiction. We do not propose to consider the validity of this objection, because,

(2) I. L. R. 16 Cal. 252 (1889).
(3) I. L. R. 13 Bom. 253 (1888).
(4) 4 C. L. J. 198 (1906).
(5) 11 C. L. J. 189 (1910).
(6) 18 C. W. N. 176: s. c. 19 C. L. J. 47 (1913).
(7) [1891] 2 Ch. 27.
(8) [1895] 2 Ch. 774.
(9) 2 Dr. and Sm. 355 (360) (1865).
(10) L. R. 18 Eq. 544 (1874).
(11) 27 Ch. D. 43 (1884).
(12) [1911] 1 K. B. 455.

as pointed out in the case of *Israil* v. *Samser Rahman* (6), it is open to the Court to give the necessary directions under sec. 15 of the Indian High Courts Act. In that case, as here, it is perfectly plain that the Defendant company, notwithstanding notice of the application for an injunction, have not only not abstained from building operations, but have, on the other hand, expedited the erection of their building, so as practically to make it extremely difficult, if not impossible, for the Court to grant an injunction. In a case of this description, it is essential that this Court should interfere to prevent what may otherwise place one of the litigating parties in an unfairly advantageous position and thus turn out, in the end, to be the cause of an irremediable injustice to the other.

[CIVIL REVISIONAL JURISDICTION]
RULE NO. 784 OF 1914.

WOODROFFE, J.
SHARFUDDIN, J.
1914,
18, November.

MATHURA NATH SINGH and ors., Defendants-Respondents, Petitioners,
v.
PRIYASHASHI DEBI, Plaintiff-Appellant, Opposite Party.

Appeal—Security for costs.

The fact that the Appellant has no money of her own is not in itself a sufficient ground for demanding security for costs.

When it appeared that the appeal was not merely vexatious (the Appellant's suit having been decreed by one Court), the fact that the Appellant had relations who had money to pay was not a sufficient ground for demanding security.

This was a Rule granted on the 17th July 1914, on the application of the Respondents calling on the Appellant to show cause why she should not be directed to furnish security for costs of the Petitioners in Second Appeal No. 3482 of 1913 pending in the High Court, as well as for costs awarded to them in the decree of the lower Appellate Court.

(6) 18 C. W. N. 176: s. c. 19 C. L. J. 47 (1913).

The material allegations were as follows :—

The Appellant was a Hindu *pardanashin* lady living with her husband and father-in-law and she had no property at all from which the Petitioners would be able to recover their costs in case they succeeded in the appeal.

The Petitioners had not been able to execute the decree they obtained for costs in the Court of Appeal below on account of the absence of any property of the Appellant against which they could proceed.

The suit was merely a speculative one, having been brought admittedly 11 years after the alleged title had accrued and the appeal was really being prosecuted on behalf of the Appellant by her husband and father-in-law, who were men of substance and who were able to furnish security for the costs of the Petitioners.

Babu Bipin Chandra Ghosh for the Petitioners.

Babu Rishendra Narayan Sarkar for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

In this case the only ground which is alleged for the application is that the Appellant has no money of her own. That is, as it has often been held, in itself no sufficient ground for demanding security for costs. It cannot be said that the suit is merely vexatious in its nature, as one Court has held that the Appellant is entitled to relief: and the fact that her

husband and her father-in-law may, as is alleged, have money to pay, is not to the point as they are not called upon to pay costs which may be due by the Appellant.

The rule must, therefore, be discharged with costs which we fix at one gold mohur.

Rule discharged.

[CIVIL REVISIONAL JURISDICTION.]

REV. No. 45 OF 1914.

FLETCHER, J. BEACHCROFT, J. 1914, Heard, 8, December. Judgment, 15, December.

DY. LEGAL REMEMBRANCER AND PUBLIC PROSECUTOR BIHAR AND ORISSA, Petitioners, *v.* RAM UDAR SINGH, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs 195, 439—Civil Procedure Code (Act V of 1908), sec. 115—24 & 25 Vict, c. 104, sec 15—Order by Civil Court refusing sanction—Jurisdiction of High Court to revise such order—Delay in applying for sanction.

The Opposite Party brought a suit for the recovery of money in the Court of the Munsif which was dismissed, the claim being found to be false and malicious. An application for sanction to prosecute the Opposite Party was however rejected by the Munsif as also by the District Judge in appeal on the ground of delay in making the application.

Held *(on an application by the Local Government against the order refusing sanction)—That it was clear from the decision of the Full Bench in* EMPEROR *v.* HAR PROSAD (1), *that the orders of the Munsif and the Judge are not orders of a Criminal Court and cannot therefore be revised under sec. 439, Cr. P. C.*

The High Court however in the exercise of its powers under sec. 115, C. P. C., and sec. 15 of the Charter Act granted sanction for the prosecution of the Opposite Party holding that the case being in substance a prosecution undertaken by Government, mere delay could not be taken as suggesting mala fides.

(1) 17 C. W. N. 647 : s. c. I. L. R. 40 Cal. 477 (1913).

This was a Rule granted on the 6th November 1914, against an order of Babu Krishna Sahay, Munsif of Muzaffarpur, dated 17th April 1914, refusing to grant sanction to prosecute the Opposite Party for an offence under sec 209, Indian Penal Code, which order was on appeal affirmed by Prosunno Kumar Gupta, Esq., District Judge of Muzaffarpur, on the 5th August 1914.

The facts are as follows :—

On the 10th December 1913, Ram Udar Singh brought a suit against the Petitioners for recovery of Rs. 30 in the 2nd Munsif's Court at Muzaffarpur. The claim was found to be false and the suit dismissed on the 3rd February 1913. On the 20th November 1913, the Petitioners made an application before the 2nd Munsif for sanction to prosecute Ram Udar. It was refused on the ground that there was a great delay in making it, and the delay was not satisfactorily accounted for. The Petitioners applied to the District Judge for reversal of this order, but the District Judge also refused his application.

It appeared that the application was made nearly 10 months after the disposal of the suit. The Applicants alleged in their petition that although they were desirous of prosecuting Ram Udar Singh for bringing the false suit, they being too poor to pay the costs of the prosecution moved the Magistrate of Champaran for help, and hence was the delay in making the application. The petition submitted to the Magistrate stated that their *malik* Tribeni Prasad and Bhukal Prasad became

displeased with them and brought false cases in Civil and Criminal Courts, through others, Ram Udar being one; and were threatening that they would bring other cases in other districts, and prayed that such steps might be taken that they might not be harassed and put to trouble by the *maliks*. The District Judge in affirming the order of the Magistrate observed: "The Applicants did not want any pecuniary help, and I do not believe that they were really in need of it. The Applicant Hira Sah in his evidence says that he himself bore the expenses of the suit brought against his father, and that he spent Rs. 60 or Rs. 70 in two cases. If he could afford to spend so much, he could spend a small amount in applying for sanction to the Munsif's Court. The application for sanction has not been made promptly, nor has the delay been satisfactorily accounted for. The reasons given by the Munsif for the view he has taken appear to me to be satisfactory, and it is supported by the rulings laid down in *Dharam Das Komar* v. *Sagar Santra* (2), and *Balwant Singh* v. *Umed Singh* (3). I therefore refuse to grant sanction and reject the application."

Mr. Sultan Ahmed for the Petitioners.

Babu Ganesh Dutt Singh for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This is a rule obtained by the Deputy Legal Remembrancer and Public Prosecutor of Bihar and Orissa, calling upon the Opposite Party to show cause why sanction for his prosecution under sec. 209 of the Indian Penal Code should not be granted.

It appears that the Opposite Party on the 10th of December 1912 brought a suit against Naik Lahera and Hira Lahera in the Court of the 2nd Munsif of Muzaffarpur to recover the sum of Rs. 35.

This suit was on the 3rd of February 1913 dismissed, the claim being found to be false and malicious. On the 20th of November 1913 an application was made to the 2nd Munsif for sanction to prosecute the Opposite Party. The Munsif heard such application and examined witnesses. The conclusion arrived at by the Munsif was that although the suit brought by the Opposite Party was false, sanction ought to be refused on the ground of delay in making the application. An appeal was then preferred to the learned Additional District and Sessions Judge, but he refused to interfere on the ground of delay. Acting under instruction from the Government of Bihar and Orissa, the present Applicant applied for and obtained the present rule.

On the hearing of the present rule it has been argued that we have no jurisdiction to revise the order of the Additional District Judge, such order not having been passed by a Criminal Court. A large number of authorities have been cited before us, but in the view I take, it is unnecessary to consider these authorities. In my opinion the law so far as this Court is concerned has been finally settled by the decision of the Full Bench in the case of *Emperor* v. *Har Prosad Das* (1). The case before the Full Bench was no doubt an order passed under sec. 476 of the Code of Criminal Procedure, but no distinction can be drawn between an order under sec. 476 and a sanction under sec. 195 for the purpose of considering the question of jurisdiction. What, however,

(2) 11 C. W. N. 119 (1906).
(3) I. L. R. 18 All. 208 (1896).

(1) 17 C. W. N. 647; s. c. I. L. R. 40 Cal. 477 (1913).

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Contents.

NOTES

Alien enemy, right to sue and be sued.

We published in our last issue at some length the report of the judgment of the Court of Appeal in England presided over by the Lord Chief Justice, the Master of the Rolls and six Lords Justices on the question of alien enemies and their right of suit and liability to be sued during war in the British Court of Justice. The first question for their Lordships' decision was who is an alien enemy. They have practically adopted Prof. Dicey's definition of alien enemies in his Treatise on Parties to an Action at p. 3. It is in the following terms:—"Under the term alien enemies are included not only the subjects of any State at war, but also any British subjects or subjects of any neutral State voluntarily resident in a hostile country."

With regard to right of alien enemies to sue, their Lordships have gone into the history of the English Law on the subject and have held that English common law does not allow an alien enemy to sue in British Courts. It was argued at the Bar that the Hague Convention of 1907 on the Laws and Customs of War on Land, Art. 23, has had the effect of abrogating the rule of English Law on the subject. But their Lordships had no difficulty in showing that the Article of the Hague Convention had reference only to the military occupation of a hostile country such as Belgium and meant that in countries under military occupation the right of the enemy people to institute legal proceedings should not be abolished by declaration of the military authorities. This has no bearing on the civil law of a country with a lawfully constituted Government.

Coming to the question of the liability of the foreign enemy to be sued in the British Courts, their Lordships held that there is no legal bar to an alien enemy being sued in the British Courts during war. This too was well settled law. On the question of alien enemy's right to prefer appeals from decrees passed against them, their Lordships held that it is but fair that he should also be allowed to prefer appeals. But their Lordships draw a distinction in this respect. If an alien enemy sued and lost before war, he shall not be allowed to prefer appeals during war. The ratio of this is said to be that it is the policy of English Law that no alien enemy shall be allowed to appear in our Courts as an "actor", or in other words to initiate legal proceedings. When he was a plaintiff before war and having lost his suit prefers an appeal during war, he does so in the same capacity and this he is not entitled to do. But when he is sued and loses, he approaches the Appeal Court as a defendant for justice as he did in the Original Court. In this capacity as a defendant he is entitled to the full legal rights and privileges of a defendant. The judgment will rank as the leading case on the subject. We regret, however, to notice that it does not answer the difficulties we pointed out in these columns in August last in connection with the liability of an alien enemy to be sued. He may by way of defence put forward a counter-claim, and his defence may assume the character of a suit instituted by him. What is to be done in such cases and would he have right of appeal in such cases? Then again if he got a decree, would he be allowed to execute it. These questions were not argued at the Bar before their Lordships and the judgment does not throw any light on these questions.

EMERGENCY LEGISLATION IN GERMANY.

Germany, like ourselves, has had to re-adjust its legal machinery to meet the exigencies of the war, and a very instructive account of this re-adjustment is given in a series of articles contributed to the *Solicitors' Journal* in October, November, and December by C. H. Huberich, of Berlin and Hamburg, Counsellor at Law of the Bar of the Supreme Court of the United States, and Richard King, Solicitor of London: Fas est et ab hoste doceri.

The dominant note is the declaration of martial law throughout the German Empire. The Ordinary Courts are not superseded, but in the interest of public security a supreme control is reserved to the military authorities over all the executive organs of government. Subject to this, German law does not place alien enemies as such, so far as regards their civil relations, under any special disabilities. They are still accorded a *locus standi in judicio*, both as plaintiffs and defendants, in the Courts, and this without regard to their domicile or place of residence; non-residence in Germany only involves this difference, that the alien enemy may be required to give special security for costs. It is important, however, for a defendant resident in England to note that under German law no appearance can be entered without a written power of attorney. Ignorance of this rule has led to many English defendants, cited by substitued service and failing to appear, having had judgment by default entered against them and execution levied. A judgment by default may, however, be re-opened within a limited time. On the important subject of contracts the situation from the German point of view may be summed up thus: Contracts with alien enemies, whether resident or non-resident, are valid, but under the Ordinance of September 30, 1914, it is forbidden, subject to certain exceptions, to make any payments or to transmit any securities to persons domiciled or resident within Great Britain or the British Colonies or Possessions; but the debtor may deposit the amount involved or the securities to the credit of the person entitled at the Reichsbank—the equivalent of our Public Trustee.

It would be impossible within the compass of a note to follow out the legislation on every point—Moratorium, Trade Mark, Patent, Prize, Supervision of Enemy Business Undertakings. Suffice it to say that the emergency provisions, taken as a whole, are creditable to Germany and its jurisprudence. They exhibit no spirit of vindictiveness. If there is retaliation, it is only resorted to where the rights conceded by Germany are refused by us. The disabilities and prohibitions, in a word, are no more than the reasonable safeguards which belligerent may exact in the presence of that hideous anomaly—War.—*The Journal of the Society of Comparative Legislation (New Series), No. XXXII, January 1915.*

CURRENT INDIAN CASES.

(CIVIL.)

Agreement affecting the course of justice.

UNDE ROJAHE *v.* V. CHINTA REDDY, I. L. R. 37 Mad. 408.

There is no rule or principle which would compel a party to adhere to any agreement by him that a suit may be decided in a manner different from that prescribed by law.

Indian Contract Act (IX of 1872), sec. 63.

MUTHAYA MANISGARAN *v.* LEKKU REDDIAR, I. L. R. 37 Mad. 412.

Sec. 63 does not entitle a promisee for his own purposes—and without the consent of the promisor to extend the time for performance which had been agreed to by the parties to the contract.

Suit for redemption of mortgage, valuation of.

M. V. CHAPPAN *v.* P. RAKU, I. L. R. 37 Mad. 420.

The proper valuation of a suit to redeem a mortgage is the amount of the mortgage or mortgages admitted by the Plaintiff to be binding on him, not the mortgages set up by the Defendant.

Transfer of Property Act.

ARIYAPUTHIRA *v.* MUTHU KOMARASWAMI, I. L. R. 37 Mad. 423.

All important transfers of landed property (even transfers of choses in action and transfers of intangible rights) should be evidenced by registered instrument so as to prevent litigants from letting in oral evidence as to alleged transfers about the truth or falsehood of which oral evidence it is almost impossible for Courts to come to a satisfactory conclusion in most cases.

All transfers of land by conveyance if they are not settlements or declarations of trust were intended by the legislature to come within one of the headings "Sale", "Exchange" or "Gift" in the Transfer of Property Act.

Evidence Act (I of 1872), secs. 107, 108.

B. VURAMMA v. G. CHENNA REDDI, I. L. R. 37 Mad. 440.

Both secs. 107 and 108 deal with the procedure to be followed when a question is raised before a Court as to whether a person is alive or dead. Neither of these sections lays down any presumption as to how long a man was alive or at what time he died.

Mahomedan Law—Gift made in mortal illness.

ALI HUSAIN v. FAZAL HUSAIN, I. L. R. 36 All. 431.

Among the Shiahs as amongst the Sunnis a *wakf* made in death illness is, unless assented to by the heirs, valid to the extent of one-third only even if possession has been delivered under it.

Limitation Act— Step in aid of execution.

AMINA BIBI v. BANARSI PROSAD, I. L. R. 36 All. 139.

An application by a decree-holder asking for substituted service of notice of his application for attachment and sale of the judgment-debtor's property on the ground that as the judgment-debtor was a *purdanashin* lady it was difficult to serve notice on her in the ordinary manner is a step in aid of execution.

Pre-emption.

MUHAMMAD AHSANULLAH v. SHAMSUNNISSA BIBI, I. L. R. 36 All. 456.

In a suit for pre-emption the law allows the Plaintiff to base his claim alternately under certain contract or Mahomedan Law.

Reviews.

SOHONI'S COMMENTARIES ON THE CODE OF CRIMINAL PROCEDURE. Eighth Edition. Revised and enlarged and brought up to July 1914. *By N. T. Shamanna, B.A., B.L., Vakil, Madras High Court. Printed by Addison & Co., Madras, for the Deccan Book Agency, Poona City. 1914.*

The book has passed through several editions since the death of the author who laid the first foundation of its reputation. That it still occupies as high a place in the estimation of the profession as it did in the author's lifetime is due to the fact that it has been extremely fortunate in its editors. This, we believe, is the second edition brought out by the present editor. It is like its predecessor exhaustive, well arranged, and marked by a high degree of accuracy. Rules and forms in use amongst Police Officers and Magistrates are all set out in their proper places, and its generally cyclopedic character is accentuated by its being prefaced in this edition by two lists of cases, one arranged according to cause titles and the other according to the Reports in which they appear, an exhaustive subject index, several appendices containing other enactments bearing on the Law of Criminal Procedure (such for instance as the Extradition Act and the Police Acts) with notes and a re-print *in extenso* of the three amending Bills now pending consideration in the Governor-General's Council, *viz.*, X of 1913, as amended by the Select Committee, and II and III of 1914. The book covers over 1,500 pages. That it is yet not unweildy and is on the other hand quite handsomely got up reflects the greatest credit on its printers.

THE YEARLY DIGEST OF INDIAN AND ENGLISH CASES, 1914. *By K. Bhashyam Iyengar, B.A., B.L., and P. Narayanaswami Iyer, B.A., B.L., Vakils, High Court, Madras. Printed at the Commercial Press, Madras, S. E. Price Rs. 4.*

The Digest has gained considerably in bulk, owing partly no doubt to one praiseworthy innovation, *viz.*, a section digesting important English decisions. And yet the table of cases judicially considered has not been incorporated with it and is due to appear separately. The titles are well selected, the notes of cases commendably brief and well arranged and the cross-reference just sufficient.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before N. R. CHATTERJEA and GREAVES, JJ. APPEAL FROM APPELLATE DECREE No. 2908 OF 1913. KSHIROD CHANDRA GHOSH, Appellant v. SRIS CHANDRA GHOSE AND OTHERS, Respondents. Heard. 19th January. Judgment, 26th January 1915.

Right of way—Grant, presumption of—Decision of new ground—Limitation Act (IX of 1908), sec. 26.

The appeal arose out of a suit for establishment of a right of way and for other reliefs.

The Plaintiffs alleged that they, and their

predecessors before them, had enjoyed the right of way peaceably and openly, as of right and without interruption for about a hundred years, and prayed for establishment of their ancestral right of way—"a right by possession for a period over the period of limitation" or "a right of easement by user and necessity."

The Defendants pleaded *inter alia* that the Plaintiffs had no right of way. The Court of first instance held that the pathway beyond 3 cubits in width had been obstructed for 7 years before the suit, and apparently treating the suit as one under sec. 26 of the Limitation Act, held that such portion of the claim must be dismissed, but gave a decree for a right of way to the extent of 3 cubits in width in respect of which the Plaintiffs had proved user within two years of the suit. Both parties appealed to the lower Appellate Court and that Court held that the right of way had been in existence from 1839 and that the same clearly proved a "right by grant or otherwise an ancient right of way for the Plaintiffs in the disputed land, and a right independently of the right by user or easement right given by the Limitation Act," and that the "Plaintiffs' right was not dependent on the evidence of 20 years' user and user within two years of the suit" and accordingly decreed the appeal of the Plaintiffs. The Defendant appealed to the High Court.

Held, that the Court of Appeal below was right in referring long enjoyment of the right since 1839 to a legal origin and in presuming a grant.

Babus Mohini Mohon Chakrabarty and *Khitis Chunder Sen* for the Appellant.

Babu D. L. Kastgir for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION.—Before N. R. CHATTERJEA and BEACHCROFT, JJ. APPEAL FROM APPELLATE DECREE NO. 1867 OF 1911. SHIBA DASS DUTT, Defendant, Appellant *v.* BHUPENDRA NARAIN DUTT AND OTHERS, Plaintiffs, Respondents. Heard, 17th December 1914. Judgment, 12th January 1915.

Estoppel—Rent, payment of, for a number of years—Mistaken view of the effect of previous decision.

The appeal arose out of a suit for rent in respect of a tenure held by the Defendants under the Plaintiffs and their co-sharers. The tenure was situated in the Sunderbans and was held under two *pattas*, one of 1835 and the other of 1840. In the *patta* granted by the Government to the lessor, a deduction of 25 per cent. was allowed for embankments, bridges, hips, cow-paths, etc., but at the dates of the leases to the predecessors of the Defendants the lessors had not obtained the final *patta* from Government. The rent provided for by the first lease was 8½ as. per bigha after the *rasadi* period, and it was stipulated that "whatever shall be determined on enquiry in respect of the embankments and hips and unculturable lands by the Sarkar shall come into effect in respect of you." By the second lease which related to the adjoining plot of land, the rental after the *rasadi* period was fixed at 9 annas per bigha, and it was stated therein "I shall allow you deduction on account of embankments, bridges, hip, pastures and unculturable lands, in the same manner in which I shall get the same from Government."

The Plaintiffs' case was that the Defendants were entitled to a deduction only of the actual unculturable area and that the decisions in the previous suits (Nos. 49 of 1887 and 13 of 1895) established the area of the tenure to be 2,610 bighas and the rent payable in respect thereof Rs. 1,434-8. The Defendants contended that upon a proper construction of the leases of 1835 and 1840 they were entitled to a deduction of one-fourth irrespective of the quantity of the actual cultivated area, and that the decision in a previous suit (No. 10 of 1900) operated as a *res judicata* in their favour. The Courts below held that the decrees in the previous suits (Nos. 49 of 1887 and 13 of 1895) operated as *res judicata* in Plaintiffs' favour and concurred in decreeing the suits.

Held, that the mere facts that the Defendants paid or deposited rent at the rate claimed for a number of years, upon a mistaken view of the effect of the previous decision, could not disentitle them from claiming a deduction of one-fourth of the lands, to which they were entitled under the terms of the leases. The payment or deposit of rent at the rate claimed did not operate as an estoppel. That it was not necessary to take any steps with regard to the decrees, in order to enable the Defendants to claim a deduction of one-fourth of the lands upon a proper construction of the leases.

Babus Jogesh Chunder Roy and *Bepin Behary Ghose* for the Appellant.

Babus Provas Chunder Mitter and *Sailendra Nath Palit* for the Respondents.

A. T. M. *Appeal allowed: case remanded.*

is abundantly clear from the decision of the Full Bench is that the order of the Munsif and the Additional District Judge are not orders of a Criminal Court and therefore cannot be revised by us under sec. 439 of the Code of Criminal Procedure. We have, however, being duly authorised by the Chief Justice under sec. 14 of 24 and 25 Vic., c. 104, to deal with these orders under sec. 115 of the Civil Procedure Code and sec. 15 of 24 and 25 Vic., c. 104. The point arises whether we ought to exercise such jurisdiction in the case before us.

It has not been suggested in the argument that there is any general rule of practice followed in this Court as to the Court exercising or refusing to exercise the powers that it possesses to revise orders of this nature. The authorities that were cited during the argument are in many instances difficult to reconcile with each other and in some cases difficult to understand. Ought we therefore to interfere with these orders refusing sanction by the lower Courts? The ground for refusing sanction in the Courts below was solely that of delay. Doubtless in many cases where there is delay by a person in applying for the sanction to prosecute, the delay may suggest a want of good faith on the part of the Applicant. The present case, however, is in substance a prosecution undertaken by the Government and mere delay cannot therefore be taken as suggesting *mala fides*.

I think the reasons assigned by the lower Courts for refusing to grant a sanction, when they came to the conclusion that the suit was false and malicious, are insufficient and have occasioned a failure of justice. I think the present rule ought to be made absolute and sanction should be granted to prosecute the Opposite Party under sec. 209 of the Indian Penal Code. We accordingly sanction the prosecution of Ram Udar Singh under sec. 209 of the Indian Penal Code for having on the 10th December 1912 dishonestly made a false claim in Court, *viz.*, in suit No. 308 of 1912 in the 2nd Court of the Munsif at Muzaffarpur, against Naik Lahera and Hira Lahera.

BREACHCROFT, J.—I agree.

Rule made absolute.

[PRIVY CUONCIL.]

[APPEAL FROM BENGAL.]

LORD DUNEDIN.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
Heard,
2, December.
1915,
Judgment,
19, January.

AHMED MUSAJI SALEJI and ors., Appellants,
v.
HASHIM EBRAHIM SALEJI and others, Respondents.

Civil Procedure Code (Act V of 1908), secs. 2, 97—Partnership accounts, suit for—Preliminary decree declaring partnership dissolved and directing enquiries and accounts—Part ordering enquiries if to be separated from decree and treated as order—Validity of order if may be questioned on appeal from final decree—Partner trading with partnership fund on his own account—Liability to account with interest—Order on partner to bring into Court partnership funds in hand pending enquiry as to accounts—Discretion of Court as to amount when may be questioned on appeal

In a suit to have partnership accounts taken, the Trial Judge by a formal adjudication, dated 30th June 1908, (1) declared that the partnership was dissolved as from 1st July 1907, and ordered and decreed, (2) that inquiry be made by the Referee as to who were the partners, and (3) that the Referee should take an account of the dealings of the parties with the assets of the partnership business. No appeal was preferred from this adjudication, and

predecessors before them, had enjoye HASHIM EBRAHIM SALEJI.
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This was an appeal from a judgment of the Calcutta High Court, dated the 1st September 1913. The facts of the case, as well as the questions raised on the present appeal, sufficiently appear from the following judgment of Sir Lawrence Jenkins, C. J., in which Woodroffe, J., concurred :—

"This is an appeal by Ahmed Musaji Saleji, Ismail Ahmed Mahomedi and Mahomed Musaji Saleji from decrees and orders passed and made by Fletcher, J., on the 30th August 1909, 26th January 1912, 27th March 1912 and 22nd April 1912.

"The suit relates to a partnership established to carry on the business of merchants and commission agents in Calcutta and other places in the East under the name and style of Ebrahim Soleman & Co. The terms of the partnership were originally defined by an instrument, dated the 29th December 1902, and by that instrument the partnership was expressed to be between Ebrahim Soleman Saleji, Musaji Ahmed Saleji, Mamuji Musaji, Saleji, Musaji Ahmed Saleji, Ahmed Musaji Saleji.

"Its duration was to be for five years from the 1st of January 1903, but it was in fact dissolved on the 1st July 1907.

"Ebrahim Soleman Saleji died on the 7th September 1907 leaving him surviving four sons, the Defendant Ismail Ebrahim Saleji, the Plaintiff Hashim Ebrahim Saleji, Kassim Ebrahim Saleji, and Ahmed Ebrahim Saleji, four daughters, and three widows. He left a Will of which the Plaintiff and Defendants Nos. 1, 2, and 4 and Musaji were appointed executors. Probate was granted to the Plaintiff and Defendant No. 4 and it is admitted by his Counsel that probate has since been granted to the Appellant Ahmed.

"Musaji Ahmed Saleji died on the 8th April 1908 leaving 8 sons, 4 daughters and a widow. Of his sons it is only necessary to name Ahmed, Defendant No. 1, Yusuf, Defendant No. 5, and Mahomed, Defendant No. 6. Musaji Ahmed Saleji left a Will, whereby he appointed the Defendants Ahmed Yusuf, Mamuji Musaji, and Dr. Kailash Chandra Bose his executors. Probate of this Will has been granted since the institution of this suit.

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"The present suit is brought by the Plaintiff as one of the executors of his father Ebrahim Soleman Saleji's Will and after referring to the partnership articles of the 29th December 1902, he alleges 'that subsequently and from the beginning of 1903 the said firm of Ebrahim Soleman & Co verbally admitted three other persons, namely, the Defendants Nos. 4 to 6 as new partners therein allotting to them certain shares in modification of the terms and conditions as regards the shares of the original partners as embodied in the said deed of partnership and thereafter the shares of the said original and new partners in the said firm of Ebrahim Soleman & Co. were as follows: namely, Ebrahim Soleman Saleji a 3½ annas share, Musaji Ahmed Saleji a 4½ annas share, Mamuji Musaji 3 annas share, Ahmed Musaji Saleji, a 1 anna and 3 pies share, Ismail Ahmed Mahomedi a 1 anna and 9 pies share and the Defendants Nos. 4 to 6 a 6 pies and 9 pies and 1 anna shares respectively each, the whole being considered as divided into 17 annas, and as evidenced by the books of that firm, and the said partnership business was continued and carried on as before by the said 8 partners.'

"By his plaint the Plaintiff prays 'that an account may be taken of the assets of the said partnership business and an account of all partnership dealings and transactions betweeen the said Ebrahim Soleman Saleji and the Defendants Nos. 1 to 6 from the 1st day of January 1906 to the 4th day of July 1907 including an account of the moneys due to the estate of the said Ebrahim Soleman Saleji in respect of the said charity and Zakat funds . . and that the share of the capital and profits and other moneys due to the estate of the said Ebrahim Soleman Saleji may be ascertained and that the Defendants or such of them as are in the opinion of this Court liable be ordered and decreed to pay to the Plaintiff the sums that may be found due to the estate of the said Ebrahim Soleman Saleji on taking the said account.

"The 1st of January 1906 is mentioned as the starting point of the account, because it is the Plaintiff's case that the accounts had been adjusted up to the 31st December 1905.

"A preliminary decree was passed on the 30th August 1909, whereby it was referred to the Assistant Referee—'(1) to enquire who were the partners who were entitled to shares in the assets and good will of the said partnership business, (2) to take an account of dealings of the said parties with the assets of the said partnership business without disturbing any settled account, (3) to enquire whether the said partnership business provided any charitable and Zakat funds, (4) to take an account of the amount, if any, of the said charitable and Zakat funds, and of the dealings of the partners therewith and the extent to which each of the partners may be entitled thereto'

"It is then declared 'that if the Defendants Ismail Ebrahim Saleji, Yusuf Musaji Saleji and Mahomed Musaji Saleji, subsequently admitted as partners as in the said plaint mentioned, be found on the aforesaid enquiry not entitled to share in the assets and good will of the said partnership business, they are entitled to the profits of the said business up to the date of dissolution thereof, and this Court doth reserve the consideration of all further directions and of the costs of the suit until after the said enquiries and account shall have been taken, and in the meantime the parties are to be at liberty to apply to this Court from time to time as they may be advised'

"The result has been an enquiry before the Assistant Referee, which did not end until he had made his report on the 3rd day of July 1911, close on two years after the decree.

"Exceptions were filed to this report on the 1st of August 1911 and of these Fletcher, J., finally disposed on the 29th of March 1912, and the decree was passed on the 22nd April 1912.

"It is from this decree as well as from the preliminary decree and also from certain orders that the present appeal has been preferred.

"The first ground urged on appeal is that it was erroneous to refer to the Assistant Referee the enquiry as to who were the partners entitled to share in the assets and good will of the partnership business, and it is maintained that the enquiry ought to have been held in Court and determined by the Judge.

"I think it was a mistake to have delegat-

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ed to the Assistant Referee the decision of the complicated question involved in the first enquiry. There is no rule or established course of procedure in this Court which could justify the reference to this officer of an enquiry in these terms, nor has there been any delegation of duties to the Assistant Referee under sec. 128 of the Code. I am therefore of opinion that the question involved should have been determined by the learned Judge himself before the preliminary decree.

"This view is supported by the express provisions of the Code. Thus in Order XX, rule 15, it is provided that where a suit is for dissolution of partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree, declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved, or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

"In Appendix D a form (No. 21) is given for a preliminary decree in such a suit and it starts with a declaration that 'the proportionate shares of the parties in the partnership are as follows:—' Order XLVIII, rule 3, prescribes that the forms given in the appendices with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.

"But while I think the reference should not have been directed, sec. 97 of the Code is a bar to the present appeal from the decree in which the direction was contained. It was a preliminary decree (sec. 2, explanation), and the present Appellants claim to be parties aggrieved by it; but they preferred no appeal from it within the prescribed period. Therefore they are now precluded from disputing its correctness on this appeal. This is just the class of case against which sec 97 is directed: no objection was taken to the competence of the direction when it was given, the Appellants joined in the reference without any protest, and now that the result of the reference has proved adverse to their contention, they seek to attack the decree directing that reference. This case obviously comes within the provisions of sec. 97. . . . .

"By ground 13 it is objested that the Judge erred in ordering the Appellants to deposit in Court the sum of Rs. 7,24,373-1-5 with interest at 6 per cent. from the 1st July 1907 inasmuch as there is pending an enquiry as to the liabilities of the firm in suit by and against the firm and as to what sums the Appellant Ahmed Musaji Saleji had already spent and had made himself liable.

"The reason assigned—and it is with that alone that we are concerned—does not (in my opinion) support this objection. A partnership suit is in substance an administration suit [see per Cotten, L. J., in *Butcher* v. *Pooler* (2)], and I think in the circumstances of this case it will be right for the partnership funds to be brought into Court. The enquiry directed does not furnish any valid reason against this course, though no doubt the Court will be careful that no distribution of the fund in the due course of administration will be made to the prejudice of the result of the enquiry.

"In ground 14 it is said that the Court below erred in ordering the Appellant Ahmed Musaji Saleji alone to deposit Rs. 3,94,752-5 out of the sum of Rs. 7,24,372-1-5. This sum of Rs. 3,94,752-5 is made of Rs. 3,04,019-6 traced to Musaji Ahmed & Co., of Rs. 79,121-7 for which Ahmed alone is liable, and Rs. 11,611-8 for which Ahmed and Musaji's estate are liable.

"Ahmed s grievance as formulated in this ground of appeal is against his co-Appellants and how this objection can be advanced on a joint appeal is not obvious.

"The Plaintiff might have appealed or filed a cross-objection on the ground that liability should not have been limited to Ahmed, but he has not done so.

"The 15th ground of appeal rests on a matter of which there is no evidence on the record of this suit, and I do not think we ought at this stage to entertain the objection. Whether it will afford any answer to an application for enforcement of this part of the decree it would be premature to consider.

"And now I come to a question of some difficulty: it is whether the Judge erred in directing the payment of interest. This seems to be covered by the 16th ground of appeal.

(2) I. R. 24 Ch. D. 276 (1883)

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"Unfortunately the right to payment of interest was not discussed before Fletcher, J., and the order was made for interest from the 1st July 1907 without any real argument or exposition of reasons. Before us too the question has been but meagrely treated, and yet it is one that calls for careful consideration, for the rule to be applied must be deduced in almost every case from the particular circumstances of that case [*Crawshay* v. *Collins* (3)]. The allowance of interest cannot be treated as a matter of course between co-partners.

"I propose therefore to consider the particular circumstances of this case including the conduct of the Appellants with a view to determining whether or not interest should be charged.

"The evidence (in my opinion) shows that the amounts with which the several Appellants are charged represents assets of the old firm taken and retained by them and not shown to have been received and employed by them in the proper course of the realization of the assets and the liquidation of the firm.

"Though a Receiver was appointed long prior to the preliminary decree, the three Appellants did not hand over these assets to him, nor can I find that they even brought them to his notice. On the contrary, they have resisted to the utmost all attempts to prove their possession of these assets and persisted in this resistance.

"The assets so retained have been employed by them in business conducted by them independently of the old firm.

"The Assistant Referee, who had every opportunity of forming an opinion on this point, has placed it on record that Ahmed could have materially helped him in this enquiry, but he consistently refused to give any information, unless he was confronted with an entry, which he could not possibly explain away.

"At another part of the report it is said, 'Every point of the Plaintiff's case had to be strictly proved, and he was driven to gain ground in Court inch by inch although Ahmed Musaji knew quite well that a good many of the disputed assets of substantial value were actually entered in the books of Musaji Ahmed & Co.' He then gives particular illustrations of this policy of obstruction, which I need not now repeat.

"The learned Judge's estimate of Ahmed's behaviour is not more favourable, and a careful consideration of the record satisfies me that there is ample justification for the Assistant Referee's animadversion. In estimating the Appellant's conduct it has to be remembered where all the books of the old firm went, how they have been dealt with, and in particular the episode as to the Rangoon books, which it is difficult to reconcile with proper intentions.

"There is one more fact to which I may allude. The principal claimant against the Appellants is Ebrahim's representative. But Ahmed also was appointed one of Ebrahim's executors, and though he did not in the first instance take out probate, it is admitted by his Counsel that he since has. In his reply Mr. Jackson adduced 8 reasons why he should not be charged with interest; he merely enumerated them, he did not discuss them. They were these—(1) interest was not claimed, (2) to charge interest was not in accordance with the partnership deed, (3) the partnership deed said there was to be no interest on a dissolution, (4) interest was not charged in the firm books, (5) this claim for interest was not permissible under the Interest Act, (6) *Hill* v. *South Staffordshire Railway* (4) is opposed to the claim, (7) as also *Ward* v. *Eyre* (5), and (8) the law as summarized in Mayne on Damages.

"This argument is suggestive of the view that the real principle which is decisive of this claim one way or the other was not clearly perceived.

"The difficulty supposed to be occasioned by the absence of any claim for interest may (I think) be surmounted by the aid of the decision in *Burland* v. *Earle* (6).

"And if the Court has the power to award interest, the only question is whether in the circumstances of this case it was not just and proper to order its payment.

"Lord Selbourne in *Barfield* v. *Loughborough* (7) said 'with respect to the drawings of

(3) 2 Russ. at p 344, per Lord Eldon (1826).

(4) L. R. 18 Eq 154 (1874)
(5) L. R. 15 Ch. D 130 (1880).
(6) L. R. [1905] A. C. 590.
(7) L. R. 8 Ch 7.

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each partner out of the partnership, I do not find in the partnership articles any provision for charging interest. Down to the date of the dissolution, the accounts ought in this respect to be taken upon the footing established by the usage of the partnership. After that date any sums received and retained to his own use by any partner out of the partnership assets ought to be debited to such partner, as at the dates when they were received, in reduction, *first*, of the interest accrued after the dissolution on the principal sum (if any) due to such partner, at the date of the dissolution, and, *secondly*, of the interest bearing debt itself. For charging interest against either partner after the dissolution on sums not retained to his own use, and not shewn to have been received or employed otherwise than in the proper course of the realisation of the assets and liquidation of the concern, I see no ground.'

"It is well settled that where after dissolution some of the partners continue the business or some part of it with the assets of the old firm the others are entitled to participate in the profits that can be fairly attributed to those prior to the final winding up.

"This rests upon the general principle *accessorium sequitur principale*.

"And I may here refer to what was said by Lord Cairns in *Vyse* v. *Foster* (8).

"There has been here such an employment of the old firm's assets, and though this might be the ground of an enquiry, I doubt whether in the circumstances of this case it would lead to any useful result. I think therefore that this is a case where the abiding direction to Indian Courts to proceed in all cases according to justice, equity and good conscience, sanction the award of interest as directed by Fletcher, J.

"I may here refer to the provisions of the Indian Trusts Act. This Act, it is true, has not yet been applied to Bengal, though the question whether it should be applied is, I believe, under consideration. Sec. 88 provides that where a partner or other person bound in a fiduciary character to protect the interest of another person by availing himself of his character gains for himself any pecuniary advantage he must hold for the benefit of such other person the advantage so gained. The illustrations show the applicability of the rule laid down in the section.

"And there is yet another point of view from which this claim may be regarded.

"Lord Selbourne's exposition of the law, to which I have referred, contemplates that there may be conditions in which interest may be charged, and we find that notwithstanding the English Statute, which is reproduced here by the Interest Act, there are cases where interest is charged.

"In *Johnson* v. *Rex* (9), it was said 'In order to guard against any possible misapprehension of their Lordships' views they desire to say that in their opinion there is no doubt whatever that money obtained by fraud and retained by fraud can be recovered with interest.'

"It may be that there was not fraud on the Appellants' part, but there is much in the conduct disclosed that comes very near it; and at least there has been such an improper application of the firm assets by the Appellants as would justify the charge of interest [see *Evans* v. *Coventry* (10), *Clements* v *Hall* (11), *Burland* v. *Earle* (6) and *Gokul Krishna Das* v. *Sashimukhi Dasi* (12)].

"The conclusion then to which I come is that Fletcher, J., had a discretion in this matter which permitted him to allow interest, and that having regard to the conduct of the Appellants and the circumstances under which the liability arose, we ought not to interfere with his direction. No complaint has been made of the rate of interest allowed."

Hence this appeal.

Sir Robert Finlay, *K. C.*, and *Mr. A. M. Dunne* for the Appellants submitted that the judgment of the High Court was erroneous. *Firstly*, the Trial Judge had no jurisdiction to refer to the Assistant Referee the enquiry as to who were the partners entitled to share in the assets of the firm. It was the province of the Court itself to make the enquiry, and to determine that question. That the Trial Judge

(8) L. R. 7 H. L. 333.

(6) L. R. [1905] A. C 590 at p 592.
(9) L R [1904] A. C. 8 7
(10) 8 DeG. M. and G. 835.
(11) 2 DeG. and J. 173 at p. 186 (1858).
(12) 16 C. W. N. 299 at p 304 (1911).

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was wrong in making the said reference was conceded by the High Court. But the High Court held that the Appellants were precluded by the provisions of sec. 97 of the Code of Civil Procedure, 1908, from disputing the correctness of the "preliminary decree", which contained the order of reference and from which they could have appealed, but did not do so. It was an erroneous view of sec. 97. The section only deals with a "preliminary decree", and those words are defined by sec. 2, cl. (2). A "preliminary decree" under that section must involve an adjudication or judicial determination of the rights of the parties with regard to a matter in controversy in the suit.

The order of reference was purely an order without being in any sense an adjudication contemplated by the section. It was not a decree, but an order as defined by sec. 2, cl. (14), and was not appealable.

[LORD SUMNER.—In some respects it is certainly a decree.]

Sir Robert Finlay.—I agree that it is a decree in so far as it declares rights, but it is not a decree in other respects, it is only an order.

Sec. 104, C. P. C., specifies the orders that are appealable, but the order in question is not one of them.

Reference was made to *Khadem Hossein* v. *Emdad Hossein* (1).

Mr. Dunne followed on the same point. (Their Lordships intimated that sec. 97 applied, and precluded the Appellants from raising the point.)

(2) The Courts below were wrong in directing the Appellants to pay interest. Interest was not claimed by the Plaintiffs in their plaint. There was nothing wrong in Musaji having the money. There was no finding of misconduct or fraud against him. In order to make him liable to pay interest, there must be proof of fraudulent retention or improper application of the money of the firm. There was no proof of that here. Further, it must be proved from which date the fraudulent retention of the money commenced. Interest ought not to have been allowed from the date of the dissolution of the partnership.

Reference was made to *Johnson* v. *Rex* (9); Bullen and Leake, 2nd Ed., pp. 51, 52; 3 and 4 Wm. IV, secs. 28, 29, Act 32 of 1839; *Burland* v. *Earle* (6).

(3) The Courts below erred in ordering the Appellants to deposit in Court the sum of 7 lakhs with interest because the Appellants themselves were admittedly entitled to at least 8¼ annas share of the assets of the partnership.

Mr. Upjohn, K. C., Mr. Cozens Hardy, K. C., and *Mr. G. R. Lowndes* for the Respondents submitted that the Appellants were liable to pay interest. It was settled law that if a continuing partner, after dissolution, gets assets of partnership into his hands, and retains them or trades with them, the other partners can elect to claim from him either the profits made from the use of assets, or interest on the money from the date of the dissolution. That was quite apart from misconduct. Here the findings of the Courts below very nearly amounted to a finding of misconduct on the part of the Appellants. Reliance was placed on Lindley on Partnership, Bk. I, Ch. II, sec. 2, p. 677; *Clements* v. *Hall* (11) and *Yates* v. *Finn* (13). It was immaterial whether interest was claimed in the pleadings or not: *Burland* v. *Earle* (6). In any case it was a matter of discretion for the Courts below, and that should not be disturbed.

As regards the third point, it was a

(1) I. L. R. 29 Cal. 758 (1901).

(6) L. R. [1905] A. C. 590 at p. 592.

(9) L. R. [1904] A. C. 817.

(11) 2 DeG and J. 173 at p. 186 (1858).

(13) 13 Ch. D. 839 (1880).

proper direction for the Appellants to deposit the money in Court. It was a species of administration, and such directions were usual when a receiver is appointed.

Sir Robert Finlay replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—This was an action to have partnership accounts taken, and for that purpose to have various matters decided by the Court. Three questions only were raised before their Lordships on the present appeal.

The circumstances raising the first question were as follows. The membership of the firm was in dispute. Certain persons were alleged, on one side, to have been partners, and, on the other, to have been only employees remunerated by a share of annual profits. The suit was begun on 30th June 1908, and on 30th August 1909 the Trial Judge, Fletcher, J., by his formal adjudication (to use a neutral term) "declared" that the partnership in question was dissolved as from 1st July 1907, and then "ordered and decreed" that—

"It is referred to the Assistant Referee of this Court to take the following account and to make the following enquiries, that is to say:—

1. To enquire who were the partners who were entitled to share in the assets and goodwill of the said partnership business;

2. To take an account of the dealings of the parties with the assets of the said partnership business;"

and, further, certain other matters not now material.

This adjudication was immediately appealable but was not appealed. The Assistant Referee duly held the enquiries directed, and all matters were gone into at a great expenditure of time and money. His report on enquiry No. 1 was adverse to the Appellants, and being excepted to by them was confirmed by Fletcher, J.

The Appellants then, by memorandum of appeal, dated 23rd May 1912, raised the question whether enquiry No. 1 was rightly included in the adjudication, dated 30th August 1909, or whether it was not one which should have been made by the learned Judge himself. This at once and for the first time raised the question, which is the first and chief issue in the present appeal, whether the above-mentioned determination of Fletcher, J., was a "decree" or an "order" within the meaning of those terms in the Civil Procedure Code, Act V of 1908. If it was a decree it was a preliminary decree within sec. 97, and any appeal was incompetent and barred thereby; if it was an order it was appealable still. Their Lordships would unfeignedly deplore a state of procedure which enabled the Appellants to take their chance of success before the Assistant Referee at such a cost in time and money and then, after they had lost the day, to contend that the matter never should have gone before him at all; yet it must be so if such be the meaning of the Code.

The High Court, while thinking that the enquiry in dispute should not have been directed, decided at the same time that the adjudication of Fletcher, J., which included this direction, was itself a decree and therefore being a preliminary decree could not under sec. 97 of the Code be questioned on the final appeal. Their Lordships are in accord with the learned Judges of the High Court.

The adjudication itself began by declaring that the partnership was dissolved as from a certain date, and thus *in limine* settled rights between the parties. This declaration was the foundation for all subsequent accounts and proceedings, which

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were merely incidental thereto and consequential thereon. It matters not whether the instrument of partnership fixed the dissolution at a date which had passed before the suit began, or whether the parties had agreed to a dissolution or agreed in submitting to a dissolution by the Court, or whether the Court decreed a dissolution for cause shown before it after a *litis contestatio*. The declaration when so made was what the Court's adjudication, and indeed the Appellants' own case, call it, a decree. The Code makes no provision for something which is neither a decree nor an order, nor for anything which is both, neither does it provide that one adjudication by the Court can be resolved into divers elements, some of which are decrees and some orders. This was in substance a decree : it did not cease to be such, because a subordinate part of it, if correctly made, might have been made separately as an order It conclusively determined the rights of the parties in regard to certain, and those essential, matters, involved in the suit, and the expression "matters in controversy" in sec. 2 (2) (the definition of "decree") cannot, in their Lordships' opinion, be pressed so as to exclude matters which, though as it happened they were common ground, must have been actually decided, if any question had arisen and were the foundation of the whole determination. The Code has got rid of such doubts as were debated in *Khadem Hossein* v. *Emdad Hossein* (1). Accordingly sec. 97 of the Code applies : the Appellants took their objection too late and the High Court rightly decided against them.

The residue of the case may be shortly disposed of. The Appellants were ordered to bring certain money into Court and to pay interest as from a certain date. The contention on the former point, namely, that the amount was excessive, was not raised below at all and but faintly before their Lordships. In any case the amount ordered to be brought into Court was a matter of discretion and that discretion does not appear to have been exercised on any wrong principle. No more need be said as to this. The other point is equally short. It is well settled that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon, and this apart from fraud or misconduct in the nature of fraud. The report of the Assistant Referee disclosed conduct of this sort on the Appellants' part falling within the decided cases, even if it did not amount to fraud, as probably the Referee meant to find that it did. Both Courts below adopted this report and therefore there are concurrent findings of fact against the Appellants and no question of law is raised at all.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors : *Messrs. Burton, Yeates* and *Hart* for the Appellants.

Solicitors : *Messrs. Watkins* and *Hunter* for the Respondents.

B. D. *Appeal dismissed with costs.*

(1) I. L. R. 29 Cal. 758 (1901).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 915 OF 1911.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
4, February.

RAJANI KANTA GHOSH and others, Plaintiffs, Appellants,
v.
RAMA NATH ROY and others, Defendants, Respondents.

Contribution, suit for—Rent decree—Execution by assignee against a joint tenant—Payment under compulsion—Suit if cognisable by Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41—Bengal Tenancy Act (VIII of 1885), sec. 148 (h)—Contract Act (IX of 1872) secs. 69, 70.

Where an assignee of a rent-decree having attached the moveables of Plaintiffs who were joint tenants of the holding with the Defendants, the Plaintiffs satisfied the decree, and then sued the Defendants for contribution :

Held—*That the suit was excluded from the cognisance of the Small Cause Court by Art. 41 of the Second Schedule to the Provincial Small Cause Courts Act.*

That if it were assumed that an assignee of a decree for rent is precluded from executing it even as a decree for money, the decree itself was not extinguished and could be executed on the assignee obtaining an assignment of the landlord's interest or on his retransferring the decree to the landlord.

Where, therefore, on the assignee's application for execution the Court ordered execution to issue and the Plaintiff paid in the decretal amount under compulsion of legal process :

Held—*That the Plaintiff was entitled to sue for contribution under sec. 70 as also under sec. 69 of the Contract Act.*

The benefit which the Defendants got was that they were absolved from the liability to be pursued either by the assignee or assignor of the decree.

If a payment made to an assignee of a rent-decree is accepted by him, the decree is satisfied and there is nothing in sec. 148 (h) of the Bengal Tenancy Act to prevent it.

This was an appeal from a decision of S. C. Mullick, Esq., District Judge, Nadia, dated 9th March 1911, modifying that of Babu Jagadis Chandra Goswami, Munsif, Chuadanga, dated 6th June 1910.

The facts of the case appear from the judgment.

Babu Surendra Nath Ghosal for the Appellants.

Babus Soroshi Charan Mitra, Upendra Narayan Bagchi and *Ambica Pada Choudhuri* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiffs in a suit for contribution. The circumstances antecedent to the litigation are not in controversy and may be briefly stated. The first two Defendants and the predecessor-in-interest of the Plaintiffs held a tenancy under the fourth Defendant. The rent fell into arrears, with the result that the fourth Defendant brought a suit for rent and obtained a decree on the 18th June 1907. On the 23rd January 1908 the Plaintiffs made a payment of Rs. 8 to the decree-holder. On or about the 24th January 1908 the decree-holder assigned the decree to the third Defendant who applied for execution on the 25th January 1908. The Court made an order for execution and a decree obtained by the Plaintiffs against one of their debtors was attached. On the 14th March 1908, the assignee, by process of execution, realised Rs. 119-8. Subsequently on the 29th April 1908 he realised another sum of Rs. 73 and on the 27th May 1908 after the moveables of the Plaintiffs had been attached, they paid to the assignee Rs. 390-15-3 in satisfaction of the decree.

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On the 19th August 1909 the Plaintiffs commenced this suit to compel the first two Defendants to contribute in respect of the sum they had paid in satisfaction of the joint decree. The Defendants resisted the claim on various grounds. The Court of first instance overruled their objections and made a decree in favour of the Plaintiffs for one-third of the admitted amount paid by them, against each of the first two Defendants. The first Defendant appealed to the District Judge and persuaded him to hold that no contribution could be claimed in respect of payments made to the assignee of the decree, inasmuch as under sec. 148, cl. (*h*), of the Bengal Tenancy Act the assignee was not entitled to execute the decree as he had not obtained an assignment of the land itself. The District Judge accordingly allowed the appeal and made a decree in favour of the Plaintiffs in respect of the payment made to the original decree-holder himself. The Plaintiffs have now appealed to this Court.

On behalf of the Respondents a preliminary objection has been taken that the appeal is incompetent under sec. 102 of the Code of Civil Procedure which provides that no second appeal shall lie in any suit of the nature cognizable by the Court of Small Causes when the amount or value of the subject-matter of the original suit does not exceed Rs. 500. The amount claimed in the suit is less than Rs. 500; consequently the question arises whether the suit is of a nature cognizable by a Court of Small Causes. On behalf of the Appellants, it has been contended that the suit is excluded from the cognisance of the Court of Small Causes by Art. 41 of the Second Schedule to the Provincial Small Cause Courts Act of 1887. That clause excludes from the jurisdiction of the Small Cause Court a suit for contribution by a sharer in joint property in respect of payments made by him of money due from a co-sharer. On behalf of the Respondents, it has further been contended that assuming the decree to be capable of execution at the instance of the assignee, it could be executed only as a money decree and that consequently the liability which was satisfied by the payment made by the Plaintiffs was a personal liability of the judgment-debtor and not a liability which rested upon their joint property. In our opinion there is no foundation for the contentions of the Respondents. Art. 41 of the Second Schedule to the Provincial Small Cause Courts Act clearly contemplates suits of three classes, *first*, a suit for contribution by a sharer in joint property in respect of payments made by him of money due from a co-sharer; *secondly*, a suit for contribution by a manager of joint property in respect of payments made by him on account of the property, and, *thirdly*, a suit for contribution by a member of an undivided family in respect of payments made by him on account of the family. The case before us falls within the first description of suits. It is clearly a suit for contribution as it is a suit by some of several persons, bound by a common liability, who have discharged the joint obligation, to compel their co-sharers to make good their shares. [*Satya Bhusan* v. *Krishna Kali* (1).] It has been commenced by persons who are sharers in joint property; at any rate, they were sharers in joint property at the time when the money fell due from their co-sharers, and the suit is in respect of payments made by them of money due from their co-sharers. All the three elements are consequently satisfied and the case falls within the scope of Art. 41.

(1) Since reported at 18 C. W. N. 1308 (1914).

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The preliminary objection consequently fails.

As regards the merits of the appeal it has been argued on behalf of the Respondents in support of the view taken by the District Judge that the case does not fall either within sec. 69 or sec. 70 of the Indian Contract Act. It has been contended that the assignee of the decree for rent was not entitled at all to execute the decree in view of the provisions of sec. 148 (*h*) of the Bengal Tenancy Act, that is, he was not free to execute the decree either as a decree for rent or as a decree for money. It is not necessary for us to determine whether this contention is or is not well-founded. As was pointed out by this Court in the case of *Manurattan Nath* v. *Harinath Das* (2), there is a conflict of judicial opinion upon this question; while some of the authorities are in favour of a strict and literal construction of sec. 148, cl. (*h*), of the Bengal Tenancy Act, there are other cases which support a liberal interpretation of this provision of the law. We shall, however, for the purpose of the argument placed before us, assume in favour of the Respondents that the assignee of the decree was not entitled to execute the decree even as a decree for money, as he had not obtained an assignment of the landlord's interest in the land. It does not follow, however, that the effect of the assignment was to extinguish the liability of the judgment-debtors under the decree. In the first place, it is plain that if at any time before the decree was extinguished by limitation, the assignee of the decree obtained an assignment of the landlords' interest in the land, the bar imposed by cl. (*h*) of sec. 148 would be removed and he would be in a position to enforce the decree. In the second place, it is equally clear that if the assignee retransferred the decree to the assignor, the latter would be in a position to enforce the decree. Neither of these positions could be supported if the view were maintained that the effect of the assignment was to extinguish the judgment-debt completely. The true position consequently is this. The judgment-debtors were liable under the decree, but the person who held the decree was not in a position to apply to the Court for execution till a certain contingency had happened. It was in these circumstances that an application for execution was made by the assignee, and the Court ordered execution to issue. Execution was taken out against the Plaintiffs and they satisfied the decree by payment made to the assignee under compulsion of legal process. In these circumstances it is plain that what was done by the Plaintiffs was done lawfully within the meaning of sec. 70 of the Indian Contract Act. To bring a case within the scope of that section, three conditions must be fulfilled. *First*, the thing must be done lawfully; *secondly*, it must be done by a person not intending to act gratuitously; and, *thirdly*, the person for whom the act is done must enjoy the benefit of it. Now we have held that the payment was made lawfully and in this view we are supported by the decision of this Court in the case of *Suchand Ghosal v. Baloram Mardana* (3). Was then this payment made by persons who did not intend to act gratuitously? It is obvious that when they made the payment, they did not intend to act gratuitously. Finally, the question arises, whether the person for whom the act was done has enjoyed the benefit of it. It has been argued on behalf of the Respondents that as the decree was not capable of execution at the moment when the payment was made, the Plaintiffs have not by the payment conferred any

(2) 1 C. L. J. 500 (1904).

(3) I. L. R. 38 Cal. 1 (1910).

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benefit upon the Defendants. This argument is obviously fallacious. As we have already explained, the judgment-debt had not been extinguished and the Defendants were still liable to have the decree executed against them by the assignee if he obtained an assignment of the landlords' interest or by the assignor if he obtained a re-transfer of the decree. The benefit which has been conferred upon them by the payment is that they have been absolved from the liability to be pursued either by the assignee or assignor of the decree. It has been suggested on behalf of the Respondents that the payment made to the assignee does not operate as a valid discharge of the decree. For this contention, there is, in our opinion, no foundation. Section 148 (*h*) of the Bengal Tenancy Act does not provide, either directly or by implication, that if a payment is made to the assignee and is accepted, the decree is not thereby satisfied There is nothing to prevent the assignee from accepting the payment of the decree and certifying such payment to the Execution Court.

The position consequently reduces to this The Defendants along with the Plaintiffs were liable to satisfy the judgment-debt under a decree held by the fourth Defendant. That decree was assigned to the third Defendant. He was, under certain circumstances, entitled to execute the decree and it was not impossible that the fourth Defendant might also be placed in a position to execute it by re-assignment. The third Defendant did, as a matter of fact, take out execution of the decree. Under compulsion of legal process the Plaintiffs have satisfied that decree. We are clearly of opinion that the case is covered by sec. 70 of the Indian Contract Act and that the Defendants are liable to be called upon by the Plaintiffs to contribute.

It is not necessary to discuss in detail the terms of sec. 69 of the Indian Contract Act, but it is obvious that the case is covered by that section as well. That section provides that a person who is interested in the payment of money which another is bound by law to pay and who therefore pays it, is entitled to be reimbursed by the other. Here the Plaintiffs were interested in the payment and were even bound by law to make it. It is by reason of that payment that the decree-holder, who would otherwise have proceeded with execution, has not enforced the decree. The view we take is supported by the decision of this Court in the case of *Pankhabuti Choudhurani* v. *Nandlal Singh* (4), where the earlier decisions will be found reviewed. We are therefore of opinion that whether we apply sec. 69 or sec. 70, it is clear that the Plaintiffs are entitled to succeed and this conclusion is obviously in harmony with the principles of justice, equity and good conscience.

The result is that this appeal is allowed, the decree of the District Judge set aside and the suit decreed against each of the first two Defendants for the sum claimed in the plaint together with interest and costs. The other Defendants will bear their own costs.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE No. 1412 OF 1911.

HOLMWOOD, J.
CARNDUFF, J.
1914,
Heard,
4, December.
Judgment,
7, December.

ANGNU GHASI and ors., Defendants, Appellants,
v.
CHUTHU PATRAS & ors., Plaintiffs, Respondents.

Chota Nagpur Tenancy Act (VI, B. C., of 1908),

(4) 19 C. L. J. 72 (1913).

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sec. 11—Registration of transferee of tenure in landlord's office, condition precedent to suit for rent —Record-of-rights, transferee's name recorded in, if substitute for registration.

The granting by the Settlement Department of a copy of a khewat *containing the name of a certain person as the holder of a tenure is not equivalent to registration in the office of the landlord of the transfer of the tenure to that person as contemplated by sec. 11 of the Chota Nagpur Tenancy Act.*

This was an appeal preferred on the 8th June 1911 against the decree of D. H. Kingsford, Esq., Judicial Commissioner of Chota Nagpur, dated the 24th March 1911, affirming the decree of M. G. Hallett, Esq., Sub-divisional Officer of Gumla, dated the 6th June 1910.

The facts of the case were as follows :—

The Plaintiff sued certain raiyats of the village Tintanagar for rent of their holdings for the year 1904 Sambat. The Defendants denied that the Plaintiff was their landlord for the year in suit and pleaded payment to Narain Singh, the original *jagirdar* of the village, and also contended that the Plaintiff's claim was barred by sec. 11 of the Chota Nagpur Tenancy Act, as the Plaintiff's name was not recorded in the *sherista* of the superior landlord. Two issues amongst others were raised, *viz.*, whether the payment to Narain was *bonâ fide* and whether Plaintiff's claim was barred by sec. 11 of the Chota Nagpur Tenancy Act. The Deputy Commissioner disposed of the suit in the first instance in his finding on the first mentioned issue that the payment to Narain Singh was not *bonâ fide* and decreed the suit and on appeal the Judicial Commissioner affirmed that finding and the decree of the Deputy Commissioner. The Judicial Commissioner found that Plaintiff purchased the tenure from one Monohar during settlement proceedings in 1907, that Narain having been recorded as landlord without objection by Monohar, he took objections at attestation proceedings and was recorded as Defendants' landlord in April 1908, that Defendants meanwhile in February 1908 paid up the rent due by them to Narain and that the payment was made *mala fide*.

On second appeal the case was remanded for trial of the issue whether sec. 11 of the Chota Nagpur Tenancy Act was a bar to Plaintiff's claim. The Judicial Commissioner on such remand held that the entry in the finally published record-of-rights, a copy of which was served on the zamindar, amounted to registration and that the suit was consequently not barred. The Defendants thereupon preferred the present appeal.

Babus Harihar Prosad Singh and *Rajeswari Prosad* for the Appellants.

Babu Kulwant Sahay for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

HOLMWOOD, J.—This second appeal was remanded to the lower Appellate Court for a finding whether the Plaintiffs' claim was barred by sec. 11 of the Chota Nagpur Tenancy Act. The lower Appellate Court has treated the issue as if it was whether the Plaintiffs' suit was barred by that section, which is rather a different question. It has held that the entry in the finally published record-of-rights, a copy of which was served on the zamindar, amounts to registration, and that the Plaintiffs' suit is therefore not barred. But this is an insufficient finding and does not touch the case, which is, whether the Plaintiffs are able to recover rent for the period between the acquisition of their title to the tenure and the application for registration in the landlord's *sherista*,

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which, as laid down in the section, has to be accompanied by a tender of the necessary fee to the landlord. On the plain wording of the section we must hold that however good the Plaintiffs' title may be and whatever their right to sue for rent under the law may be, they cannot recover the rent claimed by them in this suit, and that no decree can therefore be passed in their favour.

It was held by a majority of the Full Bench in the case of *Alimuddin Khan* v. *Hira Lal Sen* (1), in a case under the Land Registration Act, where the impediment was not nearly so clear as under the Chota Nagpur Tenancy Act, that the right to the rent of an estate is in the true proprietor, although unregistered, and his right to sue for rent is not taken away by anything in the sections of the Act, which do not affect his cause of action, but merely put an impediment in the way of his realizing the rent, until he has complied with the law by obtaining registration. Now even on this rule the Plaintiffs would recover nothing in this suit, since it is not pretended that they have complied with the provisions of the law. But the provisions of sec. 11 go much further and lay down that they can never recover any rent for the period prior to their application to the landlord for registration in his office. Clearly therefore any application they might make during the pendency of the suit or in future would not operate retrospectively and their claim for rent is altogether barred and will remain barred as to the rents prior to the date of application, even when they have complied with the provisions of the Act. The entry in the record-of-rights gives them only the presumption of possession under the title they claim; but it cannot give them the right to receive rent which is barred by a statutory provision of the rent law, and such entry cannot take the place of the procedure which the law has laid down as a condition precedent to the collection of rent.

I am therefore of opinion that the learned Judicial Commissioner's finding is erroneous and the appeal of the Defendants must be decreed and the Plaintiffs' suit dismissed with costs in all Courts.

CARNDUFF, J.—I agree. Where the language of an enactment is clear, there is no room for speculating as to the object of the Legislature and suggesting that something different from what the law prescribes should be accepted as sufficient, because it would equally give effect to the supposed object. Here the language of sec. 11 of the Chota Nagpur Tenancy Act, 1908, is perfectly plain, and I cannot entertain the view that the granting by the Settlement Department to a landlord of a copy of a *khewat* containing the name of a certain person as the holder of a tenure is equivalent to registration in the office of the landlord of the transfer of the tenure to that person which the section expressly requires such person to have effected. Nor do I understand how it is possible in this case to assign any date to the transferee's application for registration referred to in the section, or how we can surmount the difficulty that here there has been no tender of the registration fee to the landlord within the time prescribed.

Appeal allowed.

(1) I. L. R. 23 Cal. 87 (1895).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDERS

NOS. 245, 254, 332 AND 333 OF 1914.

D. CHATTERJEE, J.
WALMSLEY, J.
1914,
Heard, 6, August.
Judgment,
19, August.

RAI BAIJNATH GOENKA BAHADUR, Judgment-debtor, Appellant,
v.
BABU BAIJNATH SINGH, Decree-holder, Respondent.

Revenue Sale Law (Act XI of 1859), secs 33, 34—Sale for arrears of revenue, set aside on appeal by Commissioner—Commissioner's order reviewing that order and affirming sale declared by Civil Court to be* ultra vires—*Application to execute decree—Limitation.

Where the Commissioner of Revenue, on appeal preferred by the proprietors of a revenue-paying estate, set aside a sale for arrears of revenue, but subsequently in review cancelled that order and affirmed the sale, and the Civil Court, in a suit by the proprietors, declared the Commissioner's order on review ultra vires *and upheld his previous order setting aside the sale, and also awarded possession and mesne profits to the Plaintiffs,*

Held—*That the decree was not one annulling a sale as contemplated by sec. 34 of Act XI of 1859, as it only held that the Commissioner's order setting aside the sale must stand good.*

That sec. 34 did not apply to this case as it was not a suit under sec. 33 of the Act to annul a sale, the contention of the Plaintiffs being that there was no subsisting sale to be annulled.

Sec. 34 refers to cases brought under sec. 33, and the rule of limitation laid down in sec. 34 (requiring the decree-holder to apply for execution within six months of the decree) applies only to suits brought under sec. 33.

This was an appeal preferred on the 30th of June 1914, against the order of Mr. Abdul Jubbar, Additional Subordinate Judge of Zilla Monghyr, dated the 27th of May 1914.

The facts of the case will fully appear from the judgment.

Mr. B. C. Mitra and *Babu Karunamoy Bose* for the Appellant.

Babus Jogesh Chandra Roy, Noresh Chandra Sinha and *Panchanan Ghosh* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—These appeals arise under the following circumstances. An estate belonging to the Respondents was sold for arrears of revenue under Act XI (B. C.) of 1859 by the Collector of Monghyr, on January 2nd, 1900. The proprietors preferred appeals to the Commissioner of Revenue, and he passed orders on March 21st, 1900, setting aside the sale. On the application of the auction-purchasers, now the Appellants, the Commissioner reviewed his order of March 21st, and on June 21st, 1900, cancelled his order setting aside the sale, and instead, affirmed the sale.

On June 20th, 1901, the first Respondent instituted a suit against the auction-purchasers (making his co-proprietors parties), praying for a declaration that the Commissioner's order reviewing his first order was *ultra vires*, for recovery of possession of his share of the estate, and for mesne profits; he also asked for the sale to be set aside if it was held that the Commissioner's second order was not *ultra vires*, and did have the effect of affirming the sale. The Court of first instance held that the suit was barred by limitation, but on appeal to this Court it was held that the suit was within time, and the case was remanded for trial upon other issues. On remand, the suit was decided in favour of the Plaintiffs, now Respondents, the co-

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sharers having become co-Plaintiffs. There was again an appeal to this Court; the main question was whether the Commissioner had power to review his order setting aside the sale; it was held that he had not power to do so, and on that ground the appeal was dismissed. The first Appellant, then, preferred an appeal to the Privy Council, and judgment was delivered on February 11th, 1913. It was very brief, so I quote it in full "Their Lordships are clearly of opinion that the order of the 21st of March 1900 was final and conclusive, and that so far as the Commissioner was concerned, he had no power to review that order in the way in which he has reviewed it. That is the only point in the case. They will humbly advise His Majesty that the appeal ought to be dismissed". On the 27th of September 1913, the Respondent No. 1 applied for execution of the decree which it had taken so long to obtain. Three other applications were made by his co-sharers, and they were dealt with together Various objections were taken by the Appellants but the principal one was that the applications for execution were barred by limitation. The learned Subordinate Judge over-ruled this objection, and allowed execution to proceed. An appeal has been preferred by the auction-purchasers in each of the four execution cases.

The only point which has been pressed before us is that the applications are time-barred. It is contended that as the judgment of the Privy Council was delivered on February 11th, 1913, and the first Respondent's application for execution was not made until September 27th, 1913, that is, after an interval of more than six months, the applications for execution are barred by sec. 34 of Act XI of 1859. That section runs as follows :—"If a sale made under this Act be annulled by a final decree of a Civil Court, application for the execution of such decree shall be made within six months after the date thereof; otherwise the party, in whose favour such decree was passed, shall lose all benefit therefrom".

It is contended for the Appellants auction-purchasers that the sale was a sale made under the Act, and that it has been annulled by a final decree of a Civil Court. Reference is made to the case of *Sreemurti Lall Ghosh* v *Shama Soonduree Dassee* (1), but I fail to see what assistance it gives to the Appellants. In that case a sale was held to be null and void, because it had been made when no arrears of revenue were due; when the Court was asked to make a special declaration that the sale was annulled, their Lordships said "That appears to us to be unnecessary. For the purposes of sec 34 of Act XI of 1859, we consider that the sale is already annulled by the decree for possession". They cannot have been thinking of the period of limitation prescribed by sec 34, but only of the opening words of that section, and what they meant was that a sale which is null and void requires no formal annulment and that a decree directing the original proprietor to be put in possession is all that is necessary for destroying the effects of the void sale.

It appears to me that the Appellants' contention fails for two reasons. The first is, that the judgment of the Privy Council was not the final decree of a Civil Court annulling a sale made under the Act. The decree of this Court was to this effect : (1) the order of the Commissioner, dated June 21st, 1900, was declared *ultra vires* and ineffectual, (2) the order of March 21st, 1900, setting aside the sale was upheld and confirmed, (3) possession and mesne profits were awarded to the old proprietors. Their

(1) 12 W. R. 276 (1869).

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Lordships of the Privy Council said that the order passed by the Commissioner on March 21st, 1900, was final and they dismissed the appeal. Neither Court, therefore, set aside the sale; what they said was that the Commissioner had set aside the sale; and that order must stand good. As the Privy Council's judgment is not a final order annulling the sale, it does not fall within sec. 34.

The second reason is that sec. 34 refers to cases brought before the Civil Courts under sec. 33 of the Act. The earlier section sets out the grounds on which a Civil Court may annul a sale held under the Act, with certain conditions as to limitation and other matters. Then sec. 34 says, "if a sale made under this Act be annulled by a final decree of a Civil Court, application for the execution of such decree shall be made within six months". The two sections must be taken as closely related to one another, and the rule of limitation as applying only to suits brought under sec. 33. It appears to me, however, that the Respondents' suit was not a suit under sec. 33; the plaint, no doubt, did contain allegations such as are appropriate in a suit for the annulment of a sale: but the chief contention throughout all the litigation was that the sale had been set aside by the Commissioner, and that there was no subsisting sale to be annulled. On this ground I hold that the suit was not one under sec. 33 of the Act, and was therefore not subject to the special rule of limitation provided by sec. 34.

It is not asserted that the applications for execution are barred by the general rules of limitation.

I would, therefore, dismiss the appeals.

D. CHATTERJEE, J.—I agree. Costs one gold mohur in each case.

Appeal dismissed.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORIGINAL DECREE No. 464 OF 1910.

STEPHEN, J.
MULLICK, J.
1914,
Heard, 21 and 26. May.
Judgment, 10, June.

RAM SARAN LAL & ors., Defendants, Appellants,
v.
RAM NARAIN SINGH, Plaintiff, Respondent.

Jaigir, grant of—Putra-pautradi, *meaning of*

Where the sanad *granting a* jaigir *contained the recital that the grantee was to enjoy it* putra-pautradi:

Held—*That the original grantee took an absolute, heritable and alienable estate and all his heirs were capable of inheriting it.*

PERKASH LAL *v.* RAMESHUR NATH (5), *explained.*

This was an appeal preferred on the 14th November 1910 against a decree of Babu S. C. Pal, Subordinate Judge of Hazaribagh, dated the 12th August 1910.

The Plaintiff, Raja of Ramgarh, sought for the resumption of a *jaigir* village Salga, granted under a *sanad patta*, dated 3rd Falgoon Sudi, 1908 Sambat, by his ancestor Maharaja Sambhu Nath Bahadur to one Kanai Singh deceased. The *sanad* contained a recital to the effect "*putra-poutradi bhog dakhal karthi.*" The Defendants admittedly were not the lineal male descendants of the deceased Kanai Singh to whom the grant had been originally made, but were collateral heirs. The Plaintiff's case was that such *jaigirs* and *jaigirs* of Ramgarh Raj were resumable by custom on failure of male issue in the line of the original grantee; that Kanai had two sons who died without any issue; thus there being no male issue, the *jaigir* became resumable and hence the suit. The grant in question recited as follows:—

(5) I. L. R. 31 Cal. 561 at p. 596 (1904).

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Sambat unis so at ma kha chel Sudi tin roje patta kole karan (of grant) Sambhu Nath Bahadur ka ajna i je Kanai Sing ke Jagir del Karampura Pargana madhye Salga gna ek dak kaman tin so aye hakimi daya shi ek sa bara at anna te hi me map karai pachatter baki hakimi sicca saintris at anna sal sal del karthi putra-poutradi bhog dakhal karthi Gaon Kam diatha.

Babus Umakali Mukherjee, Monmotha Nath Mukerjee and *Satindra Nath Mukerjee* for the Appellants.

Babus Provash Ch. Mitter and *Susil Madhab Mullik* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff in this case is the zamindar of Pargana Raj Ramgarh which includes Mauza Lalga, of which he says that a *jaigir* was granted to one Kanshi Singh in 1852. Kanshi had two sons, of whom one predeceased him, dying childless, and the other Bansi Lal succeeded him, but died in 1897 without having male issue. The Plaintiff succeeded in collecting rents for two years, but was dispossessed by the Defendants in 1899. He now sues for possession and *mesne profits*, alleging that he is entitled to resume his ancestor's grant on the failure of male issue of the grantee.

To this claim the Defendants set up two defences, one based on fact and one on law. The first was that the grant was made not to Banshi, as the Plaintiff says, but to Raghu, Banshi's father, of whom the Defendents are descendants in the male line. There are many difficulties about this defence which is not supported by the evidence, and it was given up in the lower Court, and not raised here, and need not therefore be further noticed. The second defence raises a question of some importance. The facts are that the subject-matter of the original grant was certainly a *jaigir*, and it was conveyed to Banshi with the words, or word "*putra-poutradi*" the significance of which we have to determine. Also there is evidence which may be summarised by saying that it shows that *jaigirs* granted by the Raj were terminable on the death of male heirs, though there is no case to show that this was so where the words *putra-poutradi* were used.

There is good authority for saying that a grant of a *jaigir* is a grant for life only; see Reg. XXXVII of 1793, sec. 15, and *Gullabdas* v. *Collector of Surat* (1). The question is—how is this estate extended by the addition of "*putra-poutradi*"? The words literally translated are, as we understand, *putra* (son), *pautra* (grandson) and *adi* (others), but the expression must of course be construed in the first place according to any construction that has been legally recognized. Such a construction is to be found in the following cases. In *Ramlal Mukerjee* v. *Secretary of State* (2), the Privy Council recognised as correct a construction of "*putra-poutradi-krame*" which regarded it as implying an absolute and heritable estate, and as passing an estate of inheritance. The principal question then argued was whether the words would apply to a female as well as a male descendant; but the question arose in an administration suit, and the decision that the words in question passed an absolute estate of inheritance cannot be treated as *obiter*. The same view seems to have been taken in *Bhujanga* v. *Ramayamma* (3). In *Lalit Mohan Singh* v. *Chukunlal Roy* (4), the same words as before were treated by the Privy Council in the same

(1) L. R. 6 I. A. 54 : s. c. I. L. R. 3 Bom. 186 (1878).
(2) L. R. 8 I. A. 62 : s. c. I. L. R. 7 Cal. 304 at p. 310 (1881).
(3) I. L. R. 7 Mad. 387 (1884).
(4) 1 C. W. N. 387 : s. c. I. L. R. 24 Cal. 834 at p. 849 (1897).

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way. On the other hand, in *Perkash Lal* v. *Rameshur Nath* (5), this Court laid down that in Chota Nagpur the general rule recognised by the Privy Council was modified by a custom, that the words "*al aulad*" were to be interpreted as limiting a grant to the lineal male descendants of the grantee, and it is argued, and in our opinion cannot be denied, that no wider construction can be given to the words '*putra-poutradi*". But this custom was in effect applied only to a village in the Pargana Kandu. It is stated to be applicable to Chota Nagpur, which may mean the pargana so named, or the area now known as Chota Nagpur Division. If the former, the custom does not apply in this case: if the latter, it seems that the decision was wider than was necessary on the facts of the case. In the case of *Roopnath Kunwar* v. *Jugunnath Sahee Deo* (6), a *jaigir* was granted "*nussalun bad messalin*"—in lieu of services—and a custom that the zamindar should resume the grant on the death of the *jaigirdar* without lineal descendants was recognised. The limits of the custom are not however prescribed, and the custom there acted on is not that which is now set up.

The result is that we see nothing in the cases to modify the general rule laid down by the Privy Council, in its application to the present case.

Under these circumstances we hold that the original grantee took an absolute, heritable and alienable estate; and that all his heirs are capable of inheriting it.

The result is that the appeal is allowed, the judgment and decree of the lower Court is set aside, and the suit dismissed with costs here and in the lower Court.

Appeal allowed.

(5) I. L. R. 31 Cal. 561 at p. 596 (1904).
(6) 6 S. D. A. Sel. Rep. 158 (1836).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3751 OF 1910.

STEPHEN, J.
MULLICK, J.
1913,
Heard, 28 and 29, August.
Judgment, 4, September.

ABDUL ALI, Plaintiff, Appellant,

v.

SYED REJAN ALI and others, Defendants, Respondents.

Evidence—Admissibility of document affecting the right of a person, who is no party to it, against such person—Indian Evidence Act (I of 1872), sec. 13.

The Plaintiff sued for a five annas share in the maliki *right in a certain land. His case was that his mother's father owned a ten annas share, half of which he gave to the Plaintiff and the other half to the Plaintiff's mother. The contesting Defendant who was the brother of the Plaintiff's grandfather contended that he and his brother owned the ten annas in equal shares and the effect of the gift to the Plaintiff was to convey only two annas and a half, although it purported to convey more. The lower Appellate Court gave effect to this contention relying on two documents, one executed by the Plaintiff's mother acting through his father in favour of the contesting Defendant in which it was recited that the gift of ten annas by the Plaintiff's grandfather was a mistake and that he was entitled to deal, and intended to deal, with five annas only and the other a* patta *executed by the Plaintiff's mother and father in which they stated that a five annas share in the property belonged to the contesting Defendant.*

Held—*That both the documents were inadmissible in evidence against the Plaintiff who was a stranger to them.*

That the ruling as to the admissibility of the documents in DWARKA NATH *v.* MUKUNDALAL (1) *is* obiter.

(1) 5 C. L. J. 55 (1906).

ABDUL ALI *v.* SYED REJAN ALI

This was an appeal preferred on the 21st November 1910 against the decree of Babu Aswini Kumar Bose, Subordinate Judge of Zilla Sylhet, dated the 11th July 1910, modifying the decree of Babu Nagendra Nath Ghosh, Munsif at Maulvi Bazar, dated the 6th January 1910.

The facts of the case will appear from the judgment.

Babu Ambika Ch. Das for the Appellant.

Moulvi Nuruddin Ahmed for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff in this case sues for a five annas share in a *maliki* right in certain land, and other reliefs In the first Court the suit was decreed in his favour as far as the five annas share was concerned. On appeal it was found that he was not entitled to more than a two and a half annas share. Against this decision the Plaintiff has appealed.

The Plaintiff's case is that Abbas Ali, his maternal grandfather, owned a ten annas share in the *maliki* right in the land in dispute. He gave five annas of this to his daughter, the Plaintiff's mother, and five annas to the Plaintiff, and then died. The contesting Defendant is Abbas Ali's brother, and contends that he and Abbas Ali owned the ten annas *maliki* right in equal shares, so that Abbas Ali's gift to the Plaintiff, though it purported to convey five annas, did not in fact convey more than two annas and a half. The lower Appellate Court adopted this view, relying on two deeds, one executed by the Plaintiff's mother, acting through his father, in favour of the contesting Defendant, in which it was recited that the gift of ten annas by Abbas Ali was due to a mistake, and that he was entitled to deal and intended to deal with five annas only: the other being a *patta* executed by the Plaintiff's mother and father in which they stated that a five annas share in the property belonged to the contesting Defendant.

Before us it is argued that the two documents we have referred to were not admissible in evidence: and we are of opinion that this contention is sound. The Plaintiff was admittedly a stranger to both the instruments, but it is contended that they are nevertheless admissible against him by virtue of sec. 13 of the Evidence Act, and the decision in *Dwarka Nath* v. *Mukundalal* (1) supports this view. The facts of that case are not to be distinguished from those before us, and if the whole of the judgment is binding on us it is an authority for the proposition it is cited to support The case however seems to have been decided on findings of fact unconnected with the admissibility of the documents in the case, and against the Plaintiff, in whose favour they were produced. The ruling as to the admissibility of the documents was therefore *obiter*, and we cannot agree with the law there laid down. The decisions relied on are those in *Daitari Mohanty* v. *Jugobundhu* (2) and *Vythilinga* v. *Venkatachala* (3). But in the former of these cases the decision as to the document referred to only related to the manner in which it was sought to prove it, though the head-note conveys a different impression, and in the latter the documents referred to the tenure on which a whole village was held, which is a very different case from the present. The well-known cases referring to the effect of a judgment not between the parties seem to us not to decide the present question.

(1) 5 C. L. J. 55 (1906).
(2) 23 W. R 293 (1875).
(3) I. L. R. 16 Mad. 194 (1892)

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We know of no authority for saying that a private transaction between persons who have no power to bind a person whose rights it is sought thereby to affect can be admitted as evidence against him : and the obvious dangers that might arise from such a proceeding make us unwilling to hold that such a transaction is one that comes under sec. 13 unless we are obliged to.

The appeal is therefore allowed, the decision of the lower Appellate Court is set aside and that of the Munsif restored. The Appellant is entitled to his costs in this Court. On looking at the judgment of the Munsif we make no order as to the costs in the lower Appellate Court.

Appeal allowed.

CIVIL APPELLATE JURISDICTION

APPEAL FROM APPELLATE DECREE No. 2381 OF 1912.

FLETCHER, J.
RICHARDSON, J.
1914,
Heard, 6 and 7, April.
Judgment, 26, May.

KISTA BAR, Defendant, Appellant,
v.
SRIMATI BANAMOYI DEBIA, Plaintiff, Respondent.

Mortgage suit, application for decree absolute in—Limitation—Civil Procedure Code (Act V of 1908), Or XXXIV, scope and effect of.

The decree nisi in a mortgage suit was made when the Civil Procedure Code of 1882 was in force. The application for making the decree absolute was made more than 12 years after the date of the decree and after the Civil Procedure Code of 1908 came into operation.

Held—*That prior to the Code of 1908, there was no period of limitation within which a Plaintiff was bound to apply for the order absolute for sale in a suit brought for sale of the mortgaged property, and the provisions of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, which repealed secs. 85 to 90 of the Transfer of Property Act, do not apply so as to take away a vested right which the Plaintiff had of applying to have the decree for sale made absolute and the application filed by him was not barred by limitation.*

GOPESHUR PAL *v.* JIBAN CHANDRA (5), *followed.*

This was an appeal preferred on the 13th August 1912 against the decree of S. N. Mitra, Esq., Subordinate Judge, 1st Court of Zilla Midnapore, dated the 7th May 1912, reversing the decree of Babu Amar Nath Chatterjee, Munsif, 2nd Court of Contai, dated the 21st August 1911.

This case arose out of an application for making a mortgage decree absolute. The original mortgage suit was for Rs. 200 and was decreed in 1898 for Rs. 101-2 on a *solenama.* The judgment-debtor contended that the decree was satisfied. He also pleaded limitation. On the question of limitation both the Courts below held in favour of the Plaintiff and on the plea of satisfaction of the decree the Munsif found in favour of the Defendant but the Subordinate Judge in appeal disbelieved the plea of payment. The Defendant appealed to the High Court.

Babu Jyotish Chandra Hazra for the Appellant.

Babu Brojo Lal Chuckerbutty for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—The only point that calls for our decision in this appeal is whether an application for an order absolute for sale of a decree nisi, dated the 28th of September 1898, is barred by limitation.

The actual date of the application of the

(5) 18 C. W. N. 804 (1914).

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order absolute for sale does not appear from the paper-book, but it is admitted that the application was made after the Code of Civil Procedure, 1908, came into operation.

The Code of Civil Procedure, 1908, repealed secs. 85 to 90 of the Transfer of Property Act, 1882, and in lieu thereof enacted the provisions contained in Or. XXXIV in the First Schedule to the Code with reference to suits relating to mortgages on immoveable property.

Prior to the Code of 1908, it had been established by the decisions of this Court that, there was no period of limitation within which a Plaintiff was bound to apply for the order absolute for sale in a suit brought for sale of the mortgaged property. Thus in the case of *Tiluck Singh* v. *Pursotum Pershad* (1), Prinsep and Ghosh, JJ., decided that an application under sec. 89 of the Transfer of Property Act, 1882, to have a mortgage decree for sale made absolute was not governed by Art. 178 of the Indian Limitation Act, 1877, and that the article was limited to applications under the Code of Civil Procedure. The learned Judges towards the close of their judgment made the following remarks: "We may further observe that no final order for sale having been passed, the suit may properly be regarded as being still pending." Art. 181 of the Limitation Act of 1908 is in identically the same terms as Art. 178 of the Act of 1877.

The question for our decision depends on whether the provisions of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, apply so as to take away a vested right which the Plaintiff had of applying to have the decree for sale made absolute.

The Allahabad High Court has laid down in the case of *Kaunsidla* v. *Ishri Singh* (2),

(1) I. L. R. 22 Cal 924 (1895).
(2) 7 All. L. J. 420 (1910).

that the effect of the Code of Civil Procedure, 1908, did not take away the vested right that a party had to apply to have his decree for sale made absolute.

A contrary view was taken by the Bombay High Court in the case of *Datto Atmaram* v. *Shankar Dattatrya* (3).

But with all respect to the learned Judges who decided that case it seems to me that they founded their judgment on a misreading of the judgment of Jenkins, C. J., in the case of *Amolak Chand Parak* v. *Sarat Ch. Mukerjee* (4).

Moreover, we have the recent decision of a Special Bench of this Court in the case of *Gopeshur Pal* v. *Jiban Chandra* (5) which laid down that a right of suit is a vested right and that it is an established axiom of construction that though procedure may be regulated by the Act for the time being in force, still the intention to take away a vested right without compensation or any saving is not to be imputed to the legislature unless it be expressed in unequivocal terms.

Applying those principles to the case before us, I think the learned Judge in the lower Appellate Court came to a correct decision.

The present appeal therefore fails and ought to be dismissed with costs.

RICHARDSON, J.—I agree.

Appeal dismissed.

(3) I. L. R. 38 Bom. 32 (1913).
(4) I. L. R. 37 Cal 913 (1910).
(5) 18 C. W. N. 804 (1914).

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No. 1884 OF 1912.

FLETCHER, J.
RICHARDSON, J.
1914,
20, May.

MOKUNDA LAL CHAKRABARTI and anr., Plaintiffs, Appellants,
v.
MON MOHINI DEBI and anr., Defendants, Respondents.

Hindu Law—Sonless widowed daughter if heir.

Under the Hindu Law a sonless widowed daughter is not an heir.

This was an appeal preferred on the 9th July 1912 against the decree of B. C. Mitra, Esq., District Judge of Zilla Birbhum, dated the 30th March 1912, confirming the decree of Babu Tej Chandra Mitra, Munsif of Bolpur, 1st Court, dated the 31st March 1911.

The Plaintiffs alleged that the moveable and immoveable properties described in the schedule of the plaint belonged to one Shiban Chakrabarti. He died leaving a widow, Akhileswari and a daughter Sri Sundari. Akhileswari on the death of Shiban succeeded to the properties of her husband and on her death, Sri Sundari inherited the properties left by her father and remained in their possession till her death in the month of Sraban 1313. The Plaintiffs as the sole agnate heirs of Shiban Chakrabarti on the death of Sri Sundari became entitled to inherit the properties left by Shiban. The Plaintiffs went to take possession of the plaint properties after the death of Sri Sundari, but the Defendants refused to make over possession of them to Plaintiffs and set up a collusive deed of gift executed by Sri Sundari in favour of Defendant No. 1. The Plaintiffs brought this suit to have their title to the plaint properties declared as heirs of Shiban and to recover possession of these properties from the Defendants with mesne profits. They prayed to have the deed of gift executed by Sri Sundari in favour of Defendant No. 1 on the 3rd Sraban 1312, set aside on the ground that it was a mere collusive document.

One of the issues framed in this suit was: Is the suit barred by limitation?

The finding of the Munsif on this issue was as follows:—

"There is some dispute regarding the death of Sri Sundari. Plaintiffs' case is that she died in Sraban 1313, whereas the Defendants' case is that she died in Sraban 1312. Plaintiffs' witnesses who spoke on the point said that Sri Sundari died 5 or 6 years ago. According to them Sri Sundari's death might have taken place either in 1312 or 1313. Defendant No. 1 and Defendant No. 2 both said that she died in Sraban 1312. So I can only hold that Sri Sundari died in Sraban 1312. The present suit has therefore been brought more than 3 years after the death of Sri Sundari; so the claim for moveables is barred by limitation.

"Then as regards the immoveable properties in suit, the Defendants' case is that Sri Sundari was a widow at the time of the death of Shiban Chakrabarti and that she had no male child, her only child being a daughter—the Defendant No. 1. . . . . . It is undisputed that Sri Sundari had no other child excepting a daughter, the Defendant No. 1. The Defendant No. 1 was examined on commission . . . . . The evidence of Defendant No. 1 stands unrebutted that Sri Sundari was a widow with no male child when her father Shiban died. So the succession to the properties left by Shiban opened when Shiban died about 40 years ago, or if he left a widow, Akhileswari (as the Plaintiffs gave evidence to prove), then on the death of Akhileswari. It is admitted that Akhileswari died more than 30 years ago. (*Vide* the evidence of Plaintiff, Mokunda.) When Sri Sundari was a

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widow without a male child at the time of the death of Shiban or of his widow, and as she could not have inherited the properties left by her father under the *Dayabhaga* School of Hindu Law, the limitation began to run against the other heirs of Shiban at the latest from the death of Akhileswari which took place about 30 years ago. The claim for immoveable properties left by Shiban is thus barred by limitation".

This decision of the Munsif was affirmed in appeal by the District Judge.

The Plaintiffs preferred a Second Appeal to the High Court.

Babu Susil Madhub Mullik for the Appellants.

Babus Hemendra Nath Sen and *Sajani Kanta Sinha* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J. This is an appeal from a judgment of the learned District Judge of Birbhum, dated the 30th March 1912, dismissing an appeal from the judgment of the Munsif, dated the 31st March 1911. The suit was brought to recover possession of certain moveable and immoveable properties by the agnates of one Shiban Chakrabarti who died many many years ago, leaving his widow and a daughter who, for the purposes of this case we must assume, was a widowed daughter who was also sonless. On the facts as found by the learned Judge of the lower Appellate Court, after the death of the widow the daughter succeeded to the properties and the only question that we have got to consider in this case is whether the Plaintiffs' suit is barred by limitation. The determination of that question depends on the question as to whether the daughter of Shiban Chakrabarti, that is, Sri Sundari, took the properties as the heiress of her father or whether she was in possession of them adversely against the heirs. The point has been argued with considerable force by the learned Vakil for the Appellants and, notwithstanding those arguments, I remain unconvinced that, according to the Hindu Law, a sonless widow is an heir. The arguments put forward by the learned Vakil are rather for the reformer than for the Law Courts. The matter can be based chiefly on the construction of the Hindu Widows' Re-marriage Act, XV of 1856. Sec. 4 of that Act may be of some importance, because it expressly excepts a widow marrying again from succeeding to any property which, before the passing of the Act, she would have been incapable of inheriting by reason of her being a childless widow. It is quite true that Sri Sundari was not childless but only sonless. There is nothing however to show that Sri Sundari ever did marry again and, if she has not married again, she is governed by the rules applicable to the other Hindus. It cannot be suggested, notwithstanding the statements in the text-books, that, in an ordinary case of Hindu succession, a sonless widow is an heir. In my opinion, the present appeal fails and must be dismissed with costs.

RICHARDSON, J. I agree.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 464 OF 1912.

SHARFUDDIN, J.
COXE, J.
1915,
Heard, 8 and 11, January.
Judgment, 22, January.

BENI SINGH, Defendant, Appellant,

v.

BERHAMDEO SINGH, Plaintiff, Respondent.

Limitation Act (IX of 1908), Sch. I, Art. 181, application under Or. 34, r. 5, cl. 2 if governed by

BENI SINGH *v.* BERHAMDEO SINGH.

—Mortgage suit, application for decree absolute in —Limitation—Sec. 5, circumstances justifying the application of—Sec. 14, if applies to appeals.

The Plaintiff obtained a decree on a mortgage on the 28th July 1905, the date fixed for payment being 28th January 1906. On 31st May 1909, he applied for the decree being made absolute and that application was granted. Against this the Defendant appealed and the case was remanded on the 7th March 1910. Against the order of remand there was an appeal to the High Court, but the proceedings continued in the first Court and was disposed of on the 19th September 1910, the Court holding that the application for decree absolute was barred by limitation. On the 21st April 1911, the High Court dismissed the appeal against the order of remand and on the 16th May 1911, the Plaintiff appealed to the lower Appellate Court against the order of the 19th September 1910.

Held—*That an application under Or. 34, r. 5, cl. (2), comes within the scope of Art. 181.*

That the application for decree absolute was barred by limitation under Art. 181 of the Limitation Act.

That the appeal to the lower Appellate Court against the order of the 19th September 1910 was also barred by limitation.

That sec. 14 of the Limitation Act has no application to appeals and the present case does not come within sec. 5.

This was an appeal preferred on the 30th August 1912 against an order of Babu Lal Behari Bhaduri, Subordinate Judge of Muzaffarpur, dated 4th December 1911, reversing an order of Babu Amrita Lal Palit, Munsif of Matihari, dated the 19th September 1910.

The facts of the case are set out in the judgment.

Babus Mohendra Nath Ray and *Siva Nandan Ray* for the Appellant.

Dr. D. N. Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

COXE, J.—The Plaintiff-Respondent in this appeal obtained a decree on a mortgage on the 28th July 1905. The date fixed for payment was the 28th January 1906. On the 31st May 1909, he applied, as the Courts below describe it, to make the decree absolute, and his application was granted the same day. The Defendant appealed, and the appeal was decreed and the case remanded to the Court of first instance on the 7th March 1910. An appeal was preferred to this Court against the order of remand probably about June 1910. The proceeding, however, continued in the first Court and was disposed of on the 19th September 1910. The Court of first instance held that the application to make the decree absolute was barred by Art. 181 of the Schedule to the Limitation Act. On the 21st April 1911, this Court dismissed the appeal against the order of the 7th March 1910, and on the 16th May 1911, the Plaintiff appealed to the lower Appellate Court against the order of the 19th September 1910. The appeal was decreed and the Defendant has appealed to this Court.

It is contended on his behalf, *firstly,* that the appeal to the lower Appellate Court was barred by limitation and, *secondly,* that the application of May 1909 was barred by Art. 181 of the Schedule to the Limitation Act. It appears to me that the appeal must succeed on both grounds.

With regard to the first point, the Subordinate Judge has held that limitation is saved by sec. 14 of the Act. That section, however, has no application to appeals, nor do I think that the case comes within sec. 5. We are informed that the Plaintiff protested against the continuance

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of the proceedings in the Court of first instance after the presentation of his appeal to this Court. But the fact that this protest was overruled should have warned him that the lower Appellate Court also might take a similar view; and he ought therefore, in my opinion, to have presented his appeal against the order of the 19th September 1910 within the period allowed by law.

On the second point, the Judge has held that Art. 181 does not apply to an application under sec. 89 of Act IV of 1882, and relies on the case of *Madhab Moni Dasi* v. *Pamela Lambert* (1) as authority for holding that there is no limitation for such an application. This view evidently cannot be sustained. In the first place, in May 1909, when this application was presented, sec. 89 of the Transfer of Property Act had been repealed. In the second place, the decision that there is no limitation to such an application can no longer be regarded as good law, having regard to the decision in *Batuk Nath* v. *Munnio Dei* (2) and *Abdul Majid* v. *Jawahir Lal* (3).

It remains to decide whether an application under Or. XXXIV, r. 5, cl. (2) comes within the scope of Art. 181. On this point there appears to be some difference of opinion, one Bench of this Court in the case of *Madhab Moni Dasi* v. *Pamela Lambert* (1) having thought that it does not so come; while, another Bench in the case of *Amlook Chand Parak* v. *Sarat Ch. Mukerjee* (4) having thought that it does, though neither judgment can be regarded as a definite decision on the point.

It appears to me that the question turns on the point whether the application relates to action which the Court ought to take of its own motion, whether the party applies or not.

In the case of *Kylasa Goundan* v. *Ramasami Ayyan* (5) which was a case of the delivery of a certificate of sale to a purchaser, the Court observed "The provisions of the Limitation Act relating to applications, though in their terms doubtless most extensive, must be held to apply to applications for the exercise, by the authority to which the application is addressed, of powers which it would not be bound to exercise without such application, and not to applications to the Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character" and in the case of *Balaji* v. *Kushaba* (6), it was held that if any Act imposes on a Court a duty to do an act "which duty is in no sense conditional on an application being made for the purpose," the Limitation Act has no application. The matter was considered in the Full Bench case of *Puran Chand* v. *Radhakishen* (7), which was a case of an application to ascertain mesne profits, and there it was stated "the same principle was laid down in the case of *Kylasa Goundan* v. *Ramasami Ayyan* (5) and *Vithal Janardan* v. *Vithojirao Putlajirav* (8) in which it was held that to make the provisions of Art. 178 applicable, the application must be of such a nature that the Court would not be bound to exercise the powers desired by the Applicant without such an application being made. There are numerous sections in the Code which direct that for certain relief an application must be made; but there is nothing in the Code compelling a person having the conduct of a pending

(1) 15 C. W. N. 337: s. c. I. L. R. 37 Cal. 796 (1910).
(2) 18 C. W. N. 740 (1914).
(3) 18 C. W. N. 968: s. c. I. L. R. 36 All. 350 (1914).
(4) 16 C. W. N. 49: s. c. I. L. R. 38 Cal. 913 (1911).

(5) I. L. R. 4 Mad. 172 (1881).
(6) I. L. R. 30 Bom. 415 (1906).
(7) I. L. R. 19 Cal. 132 (1891).
(8) I. L. R. 6 Bom. 586 (1882).

suit to make formal applications from time to time asking the Court to proceed to judgment. The form of procedure and the manner of dealing with suits is amply provided for by the Code. In the present case, so far as we can see, the Court was bound on the oral application of Appellant's pleader, indeed without any such application at all, to fix a date for the first hearing of the inquiry and after hearing the parties and fixing such issues as might be necessary for the disposal of the subject-matter in dispute to proceed with it as if it were dealing with a case based on a plaint." The principle laid down in this case was followed in the case of *Dwarkanath Missir* v. *Barendra Nath Missir* (9) which related to an application for effecting a partition in accordance with a preliminary decree.

A Court is bound in my opinion to dispose of a pending suit, whether any application is made to it or not. In a case, for instance, of the assessment of mesne profits or of effecting a partition, the Court can of course adjourn the case under Or. XVII, r. 1, but otherwise must proceed with the case and dispose of it, whether any application is made to it or not. This duty seems to have been neglected in the case of *Dwarkanath Missir* v. *Barendra Nath Missir* (9) above cited; but the proceedings in that case seem to me to have been wholly irregular. But under Or. XXXIV, r. 5, the Court not only is not bound to proceed with the case, but cannot do so unless an application is made to it. The parties are at perfect liberty to drop the proceedings, and if the Plaintiff prefers not to make an application, the Court has no jurisdiction to direct a sale. This consideration seems to me to distinguish a case of this nature from the cases I have cited above and I think, therefore, that the application mentioned in Or. XXXIV, r. 5, cl. (2), is an application which comes within the scope of Art. 181.

(9) I. L. R. 22 Cal. 425 (1895).

I would, therefore, decree the appeal and dismiss the application with costs of all Courts.

SHARFUDDIN, J.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 410 OF 1912.

HOLMWOOD, J.
CARNDUFF, J.
1914,
Heard, 14 and 15, December.
Judgment, 22, December.

DINABANDHU JANA and anr., Defendants, Appellants,
v.
CHINTAMONI JANA, Plaintiff, Respondent.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 15, 21—Private award in excess of reference and contrary to law on one point, but valid as to rest—Invalid portion separable from valid—Court if may accept valid portion and pass a decree on it—Award not enforceable summarily but operative as contract.

Where the matter has been referred to arbitration without the intervention of the Court, under para. 21 of Sch. II of the Civil Procedure Code, the Court cannot proceed to file the award when any of the grounds mentioned in paras. 14 and 15 of the same Schedule is proved.

Even when the portion of the award open to exception is separable from the rest, the Court cannot proceed to give effect to the portion which is valid in a summary proceeding under para. 21 of Sch. II of the Civil Procedure Code.

The mere fact however that the award cannot be filed will not affect the validity of this portion of the award as a contract between the parties.

A mistake of law on a legal point specifically referred to the arbitrators would not

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vitiate their award, but a decision on a question of succession not referred to them and patently contrary to law cannot be accepted by the Court.

This was an appeal preferred on the 13th June 1912 against an order of Babu Narendra Krishna Dutta, Subordinate Judge of Zilla Cuttack, dated the 30th of April 1912.

The material facts of the case will appear from the judgment.

Babus Ram Ch. Majumdar and *Chandra Sekhar Banerjee* for the Appellants.

Babus Provash Ch. Mitter and *Suresh Ch. Chuckerbutty* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal from an order allowing an award to be filed under r. 20, Sch. II, of the Civil Procedure Code.

It appears that there were four brothers named Chintamoni, Dinabandhu, Jagabandhu and Keshari who were joint in mess and property. Chintamoni had three sons— Dasarathi, Panchanidi and Brahmanund.

Keshari had a son who died in his father's lifetime and Keshari is said to have adopted Brahmanund. Keshari died in 1909. At the beginning of December 1909, the three surviving brothers separated in mess, and on the 25th December 1909 an agreement was signed by the three brothers and on behalf of Brahmanund by his natural father and guardian Chintamoni to submit their affairs to arbitration with a view to partition up their properties according to shares and to settle certain disputes among them as regards the property in certain businesses, religious endowments, liability to debts, etc. On the 26th December 1909, the arbitrators made a draft award as to the shares and as to properties standing in the names of persons outside the arbitration and as to properties standing separately in the names of Chintamoni, Panchanidi and Chintamoni's wife. They also decided the question of the *shebaitship* of the *thakurs*. No stamp was forthcoming until the 20th April 1911, and so the final award which had undoubtedly been accepted by all the parties in draft, was written out on the 21st April 1911, and the present application to file the award was made on the 5th June 1911. Dinabandhu and Jagabandhu then objected to its being filed on the ground that they had never agreed to submit the matter to arbitration at all and had been induced to sign a blank paper on which the alleged agreement was fraudulently drafted. They further contended that the alleged arbitrators never took any evidence and that the arbitrators exceeded the powers given in the said *ekrarnama*. The major portion of this defence is wholly dishonest.

It is proved beyond all manner of doubt that the objectors did agree to arbitration in terms of the *ekrarnama*, that the arbitrators who are gentlemen entirely above suspicion did meet, did take the statements of all the parties and that the objectors agreed to the specification of shares and asked the arbitrators to proceed to a division of the dwelling houses and moveable properties, which was done and the parties acquiesced and took possession accordingly. There was nothing outside the scope of the reference in all this. Then came the question of the dispute about the two *thakurs*, brought by Chintamoni from another place and established at his sole expense, also about the family Bhagabat whose worship, the arbitrators found, Chintamoni had performed alone even since the separation in mess, all the others being unwilling to perform the *sheba*. This question was in our opinion clearly before the arbitrators on the reference and they had

no course open to them, under the circumstances, but to place the *thakurs* and the Bhagabat-gadi in charge of Chintamoni as *shebait*. Unfortunately, they went further and declared the order of succession to be the *shebaitship* by primogeniture in Chintamoni's family. This was not only in excess of their powers but was clearly contrary to Hindu Law. A mistake of law on a legal point, specifically referred to them, would not on the authorities have vitiated the award, but a decision affecting the succession that was not referred to them and a decision that is patently contrary to law could not be accepted by the Court and is a bar to the filing of the award in Court, though it may not affect the contract between the parties on the other points.

Having regard to the extreme dishonesty of the defence throughout and the separable character of the award as to succession, we have anxiously considered whether having regard to the provisions of r 14 (a) this portion of the award could not be struck out; but on a true interpretation of r. 21, it would appear that where any of the grounds mentioned in para. 14 or 15 is proved the Court cannot proceed to file the award when the matter has been referred to arbitration without the intervention of the Court. Even if it could be held that the invalid portion of the award was separable, it would still not be enforceable by the summary procedure of r. 20 as was pointed out in *Mana Vikrama* v *Mallichery* (1).

But in the present case there is an illegality apparent upon the face of this portion of the award, though apart from this there is no objection to the legality of the award in general apparent on the face ... pity that the arbitrators unnecessarily went out of their way to render an otherwise excellent award incapable of being filed, but the mere fact that it cannot be filed will not affect its usefulness as a contract between the parties in all matters other than the succession to the *shebaitship*. In view of the extreme dishonesty of the main defence and the very technical nature of the only objection on which the Appellants can succeed, which in itself has no pecuniary value, we must direct that the Respondents do get their full costs from the Appellants in both Courts.

The question of the properties standing in the names of persons other than those who made the reference was rightly excluded by the arbitrators from the scope of the award. We mention this since it has been urged by the Appellants that on this point also the arbitrators exceeded their powers under the reference. The appeal must be decreed and the application to file the award must be refused, but the Appellants will bear the costs in both Courts for the reasons we have stated above. We fix the hearing fee at four gold mohurs.

Appeal allowed.

(1) I. L. R. 6 Mad. 68 (1880).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES
Nos. 2208, 2389 AND 2390 OF 1911.

BEACHCROFT, J.
NEWBOULD, J.
1913,
Heard, 26 and 27 June.
Judgment 25, July.

RAJ KRISHNA RUDRA,
Plaintiff, Appellant,
v.
PHAKIR DOME,
Defendant, Respondent.

Suit for* khas *possession—Chaukidari chakran lands—Resumption by Government and settlement with private individual—Holding over by tenant without settlement from such private individual—Previous suit for compensation for use and occupation without prayer for ejectment, effect of—Acquiescence—Limitation.

RAJ KRISHNA RUDRA *v.* PHAKIR DOME.

The Plaintiff sued to obtain khas *possession of three plots of land and for damages and in the alternative for a decree declaring that the Defendants were bound to pay rent and for assessment of adequate rent. The lands in suit were formerly chakran lands which were resumed by Government and settled with Plaintiff's vendor on 7th September 1898. The Plaintiff obtained his title to the lands by purchase of his vendor's interest at an auction sale in execution of a decree in 1907 or 1908. The Defendants who held the lands as chaukidari chakran lands at the time of the resumption continued to hold them ever since without taking any settlement either from the Plaintiff's vendor or the Plaintiff. In 1902 the Plaintiff's vendor sued the Defendants in the Small Cause Court for compensation for use and occupation and obtained decrees against them. The Plaintiff brought his suit on the 10th September 1909.*

Held—*That once the chakran lands were resumed and settled with the Plaintiff's predecessor the latter had the right to take* khas *possession of the lands and the mere omission of the Plaintiff's predecessor and of the Plaintiff after him to assert that right would not amount to acquiescence on the part of the Plaintiff which would alter the status of the Defendants from that of trespassers to that of tenants and the Plaintiff was entitled to bring his suit within 12 years from the date of resumption by Government and settlement with the Plaintiff's vendor.*

That the effect of the Plaintiff's predecessor bringing a suit for compensation for use and occupation without a prayer for ejectment was not a waiver of the right to eject and a recognition of the Defendants as tenants.

It is open to an owner of land first to sue a trespasser for compensation and then to bring a suit for ejectment to assert his right to the land.

These were appeals preferred on the 15th of August 1911 against the decree of Babu Probha Chandra Singha, Additional Subordinate Judge of Burdwan, dated the 16th of May 1911, modifying the decree of Babu Gopeswar Bannerjee, Munsif, 1st Court at Katwa, dated the 18th of February 1910.

The material facts will appear from the judgment.

Babu Bepin Behary Ghose for the Appellant.

Babu Atul Krishna Roy for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The Plaintiff-Appellant brought the three suits out of which these appeals arise, against three different Defendants to obtain *khas* possession of three plots of lands and for damages. He also prayed in the alternative for a decree declaring that these Defendants were bound to pay him rent and for assessment of adequate rent.

The Court of first instance dismissed the suits. The lower Appellate Court upheld the decision of that Court so far as it refused to grant the Plaintiff *khas* possession but granted the Plaintiff decrees for rent at the rate of Rs. 4 a bigha in each suit. Against these decrees the Plaintiff has preferred these second appeals, and the only point which we have to determine is whether the Plaintiff is entitled to eject these Defendants.

There is no dispute about the main facts which are as follows:—The lands in suit were formerly chaukidari chakran lands. They were resumed by Government and settled with the Plaintiff's vendor on the 7th September 1898. At that time the Defendants were chaukidars and each was holding the land claimed in

RAJ KRISHNA RUDRA *v.* PHAKIR DOME.

his respective suit as chaukidari chakran land at the time the resumption was made. The Defendants have continued to hold these lands ever since but have never taken any settlement either from the Plaintiff's vendor or the Plaintiff. The Plaintiff obtained his title to the lands by purchase of his vendor's interest at an auction sale in execution of a decree. The exact date of his purchase is not given and is of no real importance, but the auction sale was a part of the proceedings of an execution case of 1907 and the Plaintiff's title commenced from some date in that or the following year. Previously in 1902 the Plaintiff's predecessor sued the Defendants in the Small Cause Court for compensation for use and occupation and obtained decrees against them.

The lower Appellate Court has held *firstly* :—There was a "kind of acquiescence" in the occupation of the land by these Defendants on the part of the Plaintiff and his predecessor; and, *secondly*, that the Plaintiff's predecessor having sued these Defendants for use and occupation without at the same time suing for *khas* possession, the result has been that the Defendants have been converted into tenants and the Plaintiff is not entitled to *khas* possession.

In our opinion the facts on which the learned Subordinate Judge bases his finding that there was a kind of acquiescence are insufficient to support a finding that there was such an acquiescence as would alter the status of the Defendants from that of trespassers to that of tenants. In fact acquiescence could not create a tenancy, though it might be evidence of an implied contract of tenancy. But the learned Subordinate Judge does not rely on it for that purpose. The facts stated by him are as follows :—"These Defendants were and had been in occupation of the land as their service tenures or chaukidari chakran land and they were not absolute strangers or trespassers. Besides they were suffered to remain in possession without any objection". Now it is not disputed that once these chaukidari chakran lands were resumed and settled with the Plaintiff's predecessor, the latter had the right to take *khas* possession of these lands. The mere omission of the Plaintiff's predecessor and of the Plaintiff after him to assert that right would not amount to acquiescence. To hold that the Plaintiff was not entitled to enforce this right because the Defendants had been allowed to hold the land for eleven years before this suit was brought would be equivalent to reducing the period of twelve years allowed by the law of limitation which obviously we cannot do.

There remains to be considered what was the effect of the Plaintiff's predecessor bringing a suit for compensation for use and occupation without a prayer for ejectment. The learned Subordinate Judge has relied on two rulings—*Khondakar Abdul Hamid* v. *Mohini Kanta Saha Chowdhury* (1) and *Abdul Hakim Saha* v. *Rajendra Narayan Rai* (2). The only application that the former ruling has to the present case is that it lays down that once a landlord has exercised his option of treating a trespasser as a tenant he cannot afterwards treat him as a trespasser. This is a sound principle, but the question that really arises in the present case is whether these Defendants have at any time been treated as tenants. The second of these rulings has a distinct bearing on this question and undoubtedly portions of that judgment taken by themselves would support the decisions of the two lower Courts that the Plaintiff's predecessor converted these

(1) 4 C. W. N. 503 (1900).
(2) 13 C. W. N. 685 (1909).

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Contents.

NOTES.

Kista Bar v. Srimati Banamoyi Debia, 19 C. W. N. 170.

We are informed that their Lordships Fletcher and Richardson, JJ., have on review reversed their judgment in the above case. The judgment in review which was delivered on Wednesday last will be reported in an early issue.

Reversioner's consent to Hindu widow's alienations.

The decision of the Privy Council in *Hari Kishen Bhagat* v. *Kashi Pershad Singh*, reported at p. 370 of the current volume, needs to be studied closely in order to discover what effect it may have on the decision of the Full Bench in *Debi Prosad* v. *Gopal Bhagat*, 17 C. W. N. 701: 40 Cal. 721. The Privy Council has affirmed the decision of Doss and Richardson, JJ., in *Hari Kishen Bhagat* v. *Bajrang Sahai*, reported in 13 C. W. N. 514. It will be remembered that it was because a Bench of the High Court presided over by Stephen and D. Chatterjee, JJ., differed from the law as laid down by Doss, J., in *Hari Kishen Bhagat's* case as to the sufficiency or otherwise of the consent of the nearest reversioners alone to validate a mortgage by a Hindu widow when legal necessity could not be proved, that the reference to the Full Bench was made. Doss, J.'s views on the matter as indicated in this judgment were (1) that the consent of the reversioners by itself is not sufficient to establish the existence of legal necessity, (2) that the doctrine of surrender upon which the validity of a sale out and out of the whole or *any portion* of the inheritance with the consent of all the immediate reversioners is based cannot be legitimately extended to the case of a mortgage where *ex hypothesi* the widow still retains the ownership of the estate, though subject to the liability created by the mortgage. It would be unfair to assume that his Lordship did not appreciate the difficulty of applying the doctrine of surrender in the sense in which he understood it to a case of sale of a portion of the husband's estate. But in *Bajrangi* v. *Manokarnika*, L. R. 35 I. A. 1, it appeared and was understood to have been so applied by the Privy Council, however illogically (see *Pulin Chandra* v. *Balai*, I. L. R. 35 Cal 939). Besides, the case before the learned Judge was one of mortgage and not of sale whether of whole or part, so that his Lordship was not called upon to pronounce any opinion upon the validity of a sale of a portion of the estate which was sought to be established by proof only of the immediate reversioner's consent.

The referring Judges in *Debi Prosad's* case however felt that if the sale of a portion of the estate in the absence of proof of legal necessity could be held by the Privy Council to have been validated by the immediate reversioner's concurrence, there was no room for the application of a different principle in the case of a mortgage. Since in essence a mortgage would be a partial alienation, a mortgage with similar consent should be upheld irrespective of proof of legal necessity. Like *Hari Kishen's* case, *Debi Prosad's* case was a case of mortgage, and not being inclined to follow the former they referred the question to a Full Bench.

The Full Bench did not accept the interpretation placed on *Bajrangi's* case in *Pulin*

Chandra v. *Balai*, 35 Cal. 939. By what appears to be a *tour de force* they held that whilst, on the one hand, Sir Andrew Scoble by his judgment in that case did not intend to question the doctrine of surrender as applied in Bengal (by the Full Bench decision in *Nobo Kishore* v. *Hari Nath*, I. L. R. 10 Cal. 1102, amongst others) to alienation of the whole inheritance with the reversioner's concurrence, neither did he wish to encourage its further extension, *e.g.*, to cases of partial transfers, whether by way of sale or by way of mortgage. There is however a long and almost uninterrupted course of decisions, of the Privy Council as also of the High Courts, to the effect that the consent of reversioners raises a presumption of legal necessity. On the basis of these decisions (*Bajrangi's* case being thus put out of the way) the Full Bench was able to develope a logically consistent theory of such consent raising a *rebuttable* presumption of legal necessity in favour of the alienee, the onus of counteracting which would rest on the person who seeks to question the alienation on the ground of its having been made without necessity.

The Full Bench decision was passed when *Hari Kishen Bhagat's* case was under appeal before the Judicial Committee of the Privy Council. The Privy Council in disposing of the appeal in the first place has affirmed the concurrent opinion of the Courts in India that the consent in this case as signified by the reversioner attesting the mortgage document was really no consent. Their Lordships further recorded and in accordance with their usual practice accepted the concurrent finding of fact of the Courts in India that the mortgagees had failed to prove any valid and legal necessity for the mortgages executed by the widow. Such a state of facts—in the view of the law relating to the dealings of a Hindu widow with her husband's estate, which, in their Lordships' opinion, "is now too well settled to need a prolonged consideration,"—could but lead to one conclusion, *viz.*, that the mortgage was not binding on the reversioners. This law their Lordships re-stated in the following terms: "To be valid as against their reversioners or to affect the reversionary rights a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or such alienation was made for valid or legal necessity and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. *The requirement of the law may, however, be fulfilled by proving consent or concurrence of the reversioners to or in the transactions.*"

Upon the findings arrived at, it was in this case clearly unnecessary for their Lordships to consider the effect in law of consent, if and when given, by the next reversioner to a widow's alienation. The last sentence in the above quotation may therefore very properly be described as *obiter*. But a sentence occurring in a passage in which the Privy Council proceeds to summarise what their Lordships consider to be the settled law and "too well settled for prolonged consideration" cannot obviously be disregarded as mere *obiter*. If so, what is the effect of this sentence? If effect be given to its plain meaning, the quotation can only mean, that proof of consent of the reversioners may take the place of proof of legal necessity and not that consent is only presumptive evidence of necessity. The presumption, in other words (if it must be called a presumption), is a conclusive irrebuttable presumption of law. The case, it must be remembered, was a case of mortgage, and therefore necessarily of a partial transfer within the ruling of the Full Bench. According to the Full Bench consent of reversioners in such a case can never take the place of legal necessity, it merely raises a rebuttable presumption that legal necessity existed. The observation of the Privy Council that the requirement of law may be fulfilled by proving consent of the reversioners would therefore be (if the view of the Full Bench be accepted) particularly inappropriate in its present context. The only way in which the observation can be reconciled with the decision of the Full Bench is to interpret it not according to its plain meaning, but in the light of previous decisions of the Privy Council where the consent of the reversioners has been invariably treated as evidence of legal necessity and not something which, by itself, takes the place of legal necessity and which when proved dispenses with and excludes all evidence *aliunde* of legal necessity. The passage may not unreasonably bear that meaning if it be treated as referring only to the question of onus discussed in the quotation and not to proof of legal necessity as a whole.

CURRENT INDIAN CASES.
(CIVIL.)

Mahomedan Law—Divorce.

WAHID KHAN *v.* ZAIHAB BIBI, I. L. R. 36 All. 458.

No special form or formula is prescribed for a divorce under the Hanafia Law. All that the law requires is to see that the words of divorce pronounced by a husband should show a clear intention on his part to dissolve the contract of marriage.

Mahomedan Law—Guardianship of minor.

SALIMUNNISSA *v.* SAADAT HUSAIN, I. L. R. 36 All. 466.

Under the Shia Law the maternal grandmother has no right to claim to act as guardian of a minor girl when her father is alive.

Mahomedan Law—Pre-emption.

BHAGWATI SARAN *v.* PARMESHAR DAS, I. L. R. 36 All. 476.

Where there is an entry as to pre-emption in the *wajib-ul-arz* which is clear and distinct and there is no evidence to the contrary, the Court ought, having regard to the prevailing practice, to hold that the custom of pre-emption exists.

A suit for pre-emption is not liable to be dismissed on the ground that the Plaintiff also claims a right of possession as full owner.

Suit for damages—Injury to mere licensee.

SORABJI *v.* JAMSHEDJI, I. L. R. 38 Bom. 552.

The Defendant was driving a party of relatives and friends in his own car to a certain place. On the way there was a level-crossing which was such as needed some degree of care to pass in safety. The crossing itself turned to the left somewhat abruptly from the road and after the crossing the road swung round sharply to the right. The Defendant's car failed to take the sharp right-handed turn after the crossing; instead of doing so it preserved its direction in practically a straight line with the result that just beyond the crossing it left the road and ran or jumped to the left into the paddy-field beyond with the result that all the occupants of the car were thrown out with much violence and were more or less seriously injured. The Plaintiff who was one of the occupants of the car received grave injuries to his leg, and the medical evidence proved that he would remain a cripple for the rest of his life.

Held—That the Defendant was liable to pay damages to the Plaintiff.

Railways Act.

GREAT INDIAN PENINSULA RAILWAY COMPANY *v.* THE MUNICIPAL CORPORATION OF BOMBAY, I. L. R. 38 Bom. 565.

Where a railway company wishes to lay a line of railway upon and across a street, it is neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisition of the land.

The effect of sec. 289 of the Bombay City Municipal Act vesting all public streets, pavements, stones and other materials in the Corporation and under the control of the Commissioner is only to vest in that body such property as is necessary for the control, protection and maintenance of the street as a high way for public use.

The Railways Act, sec. 16, overrides the Municipal Act and the sole control over the railway administration is vested in the Governor-General.

Registration Act—Composition deed.

CHANDRA SHANKAR *v.* BAI MAGAN, I. L. R 38 Bom. 576

By a document it was recited that it had been resolved at a meeting of creditors that if creditors of the family firm, represented by one B, should sign the deed before midnight on a certain date, B should make over to the trustees all the assets of the family subject to a special condition regarding the family houses. By one of the clauses in the document it was stated that B, having made over the whole of the trust properties and assets belonging to the family for the benefit of the creditors, the family was reduced to a destitute condition and therefore the creditors passed a resolution to the effect that they should be allowed to occupy the dwelling house and the trustees should pay an allowance to B up to a certain date and the creditors coming in under the deed agreed that after all the goods and properties had been made over to the trustees, no other claim whatever with regard to the amounts due to them should remain outstanding against B and the minor members of the family and B and the minors were to make use of the deed as a release.

Held- That the deed was a composition deed and did not require registration [cl. 2, sec. 17, of the Registration Act (III of 1877).]

Time-barred appeal.

RAOJI *v.* KRISHNA RAO, I. L. R. 38 Bom. 613.

An appeal which was time-barred was provisionally admitted. At the time of hearing the

objection was taken that the appeal had been filed beyond time and this objection was allowed and the appeal dismissed. Against this order an appeal was preferred to the High Court.

Held—That there was no objection to the Judge of the lower Appellate Court entertaining the objection as to limitation after he had provisionally admitted the appeal to the file in the absence of the Respondent.

That the appeal in the High Court was a second appeal being an appeal from a decree of an Appellate Court.

Construction of document—Sale-deed and agreement to sell—Registration.

P. MANGAMMA *v.* P. RAMAMMA, I. L. R. 37 Mad. 480.

In deciding whether a document is a sale-deed or an agreement to sell, the test is whether according to the intention of the parties as expressed in the instrument, there is a present conveyance of the property or only an agreement to create a future right.

Even if a present right is created the instrument though unregistered would be admissible as evidence in a suit for specific performance.

Married Women's Property Act (III of 1874).

P. BALAMBA *v.* K. KRISHNAYYA, I. L. R. 37 Mad. 483.

Sec. 6 of the Act applies to a policy of insurance effected by a Hindu male for the benefit of his wife or his children or of his wife and children or any of them.

Mahomedan Law—Minor's estate—Powers of de facto guardian.

AYDERMAN KUTTI *v.* SYED ALI, I. L. R. 37 Mad. 514.

The general rule is that the dealings by a *de facto* guardian of a Mahomedan minor with the minor's property do not *ipso facto* bind the minor's estate but the law recognises certain exceptions to this rule.

The exceptions are mainly based on the general principles of Mahomedan Jurisprudence that necessity is a valid ground for relaxing a strict rule of law and the application of the principle in cases where a minor has no legally appointed guardian seems to be well recognised.

Mortgage deed.

BABBU *v.* SITA RAM, I. L. R. 36 All. 478.

Where a mortgage-deed is proved to have been executed and the document contains an acknowledgment of the receipt of the consideration, this is strong *primâ facie* evidence that the consideration has been actually received and is evidence not only against the mortgagors but also against persons claiming under them, subsequent to the date of the mortgage.

Execution of decree.

MUHAMMAD HUSAIN *v.* INAYAT HUSAIN, I. L. R. 36 All. 482.

The bare fact that a man's whereabouts are not known is not sufficient to deprive the decree-holder of the fruits of his decree and there is nothing in law which would make an application for execution as against him an invalid application.

Pre-emption.

PIR KHAN *v.* FAIYAZ HUSAIN, I. L. R. 3[6] All. 488.

In a suit for pre-emption the Plaintiff was Sunni Musalman, the vendor was a Shiah and the vendees were Hindus.

Held—That the Shia Law of pre-emption was applicable.

Civil Procedure Code, Or. XLI, r. 22.

BALGOBIND *v.* RAM SARUP, I. L. R. 36 All. 505.

The language of Or. XLI, r. 22, C. P. C., is comprehensive enough to admit of cross-objections being preferred by one Respondent against another.

Civil Procedure Code, Or. XLI, r. 4.

NARAIN DIKSHIT *v.* BENAIK BHAT, I. L. R. 36 All. 510.

Where the decree appealed from proceeds on a ground common to all the Defendants and some only of the Defendants appeal, the Court may reverse or vary the decree in favour of all the Defendants.

Review.

THE LAW RELATING TO ADMINISTRATORS-GENERAL AND OFFICIAL TRUSTEES IN INDIA. *By Alex. Kinney, Administrator-General of Bengal Calcutta: Thacker, Spink & Co. 1915. Price Rs. 12.*

The author appears to have fully availed himself of his experience, as Administrator-General of Bengal, to present to the public a complete hand-book on the law relating to Administrators-General and Official Trustees. So far as its contents go, no compilation of statutory enactments,

case law, and statutory and other rules bearing on the subject could well be more exhaustive. Each of the two Acts annotated is prefaced by an informing and instructive historical introduction which gives also an analysis of the contents of the Act. The notes display wide reading and thorough insight into the subject. In the offices of Administrators-General and Official Trustees and of District Judges, it will do duty admirably as an office-manual and will be useful also to the legal profession and to such members of the general public as may desire to place estates and trusts in the hands of officials.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before THE LORD CHIEF JUSTICE OF ENGLAND, THE MASTER OF THE ROLLS, and LORDS JUSTICES KENNEDY, BUCKLEY, PHILLIMORE and PICKFORD. *Continental Tyre and Rubber Company (Great Britain) (Limited)* v. *Daimler Company (Limited)—Same* v. *Thomas Tilling (Limited).* 19th January 1915.

Can a Company, of which all the shareholders except one are Germans, but which is incorporated under the English Companies Act and carries on business in London, sue in British Courts during the war?

These were appeals from two decisions of Scrutton, J., and Lush, J., respectively. In one case, the Plaintiffs claimed to recover money on bills of exchange, which had been accepted by the Defendants before the war, but which had matured after the declaration of war. In the second case, the same Plaintiffs sued to recover from the Defendants the price of goods sold and delivered to them. The Plaintiffs were a registered company and its constitution, as found by the Court, was as follows :—

"The Plaintiffs are a limited liability company, incorporated under the Companies Act. They carry on business in London, at the registered office of the company, and have a number of agencies throughout the United Kingdom. The company was formed in 1905 with a capital of £10,000, increased in 1908 to £25,000, to trade in motor-car tires made in Germany by a company incorporated under German law. The German company formed a number of subsidiary companies in various parts of the world for the sale of these tires. The Plaintiff company was formed for the purpose of selling such tires in the United Kingdom. At the date of the writ the German company held 23,398 shares in the Plaintiff company, and the remaining shares, except one, are now held by subjects of the German Empire residing in Germany. The one share is registered in the name of the secretary of the company, who was born in Germany, resided in London, and in January 1910, became a naturalized subject of the Crown. The directors are subjects of the German Empire and are resident in Germany. The business is managed according to the evidence of the secretary by two managers and himself, all three being resident in this country."

The Defendants in each case contended that the Plaintiff company was really an alien enemy and as such could not maintain the suit. The Trial Judge repelled that contention and allowed the Plaintiffs' claim in each case.

On the present appeal, the Appellants contended that the Court ought to look at the substance of the transaction, which shewed that the company was really an alien enemy. Further, all the directors of the Company were alien enemies, and could not instruct a solicitor to institute proceedings. The rights of the directors were suspended, although not extinguished during the war.

The payment of the Plaintiffs' claim would be for the benefit of the enemy, and would amount to trading with the enemy, which was illegal, both at Common Law, and by reason of the terms of the Proclamation. The Court, Lord Justice Buckley dissenting, dismissed the appeals.

The judgment of the majority of the Court was as follows :—

It cannot be disputed that the Plaintiff company is an entity created by statute. At the outbreak of war it was carrying on business in the United Kingdom, it had contracted to supply goods, it delivered them, and until the outbreak of the war it was admittedly entitled to receive payment at the due dates. Has the character of the company changed because on the outbreak of war all the shareholders and directors resided in an enemy country and therefore became alien enemies? An English company cannot by reason of these facts cease to be an English company. It is undoubtedly the policy of the law as administered in our Courts to regard substance and to disregard form. But substance must not be treated as form or swept aside as technicality because that course might appear convenient in a particular case. The fallacy of the Appellants' contention lies in the suggestion that the entity created by statute is

or can be treated during the war as a mere form or technicality by reason of the enemy character of its shareholders and directors.

Salomon v. *Salomon* (1897, A. C., 22) and *Janson* v. *Driefontein Consolidated Mines (Limited)* (1902, A. C., 484). Payment to the Plaintiff company was not payment to the alien enemy shareholders or for their benefit. The same result was arrived at from the terms of the Proclamation relating to Trading with the Enemy issued on September 9th, 1914, which gave a definition of "enemy." Although payment was forbidden "to or for the benefit of an enemy," this prohibition did not apply when payment was made to a company incorporated in this country.

There was no judicial authority for the proposition of the Appellants, and, indeed, there was a weight of judicial opinion against it—see *Gramophone and Typewriter (Limited)* v. *Stanley* (1908, 2 K. B., 89); and *Kodak (Limited)* v. *Clark* (1903, 1 K. B., 505).

It had been argued that the Plaintiff company could not in time of war be regarded as a subject of the Crown, that it had no mind, and could not be loyal or disloyal to the State, and that only the character of the shareholders could determine whose subject the company was. That view had not been favoured by the House of Lords in *Janson* v. *Driefontein Consolidated Mines (Limited)*.

The Court were also invited to decide against the Plaintiff company on the ground that to allow it to recover debts during the war would be against public policy. But nothing would more easily tend to create uncertainty and confusion in our law than to allow considerations of public policy, as distinguished from law based upon public policy, to be a ground of judicial decision.

LORD JUSTICE BUCKLEY said that he regretted that he was unable to concur in the judgment just delivered. He regarded the question as so momentous that he made no apology for stating, as clearly as he was able, his reasons for arriving at a contrary conclusion. The artificial legal entity created by incorporation under the Companies Acts was a legal person existing apart from its corporators. On the other hand, the corporation could not exist without corporators. It had no physical existence and existed only in contemplation of law. The corporation, if it were a British corporation, stood in the same position for most purposes as a British subject, but it could not be correctly described as a British subject. A subject, he conceived, must be one who could owe and pay allegiance to the King; but this could not be predicated of the abstract legal entity. If those propositions were true, as he thought they were, they seemed to him to go to the root of the question which had in this case to be determined. This corporation was one which as a corporation certainly had in law an independent legal existence, and that legal person was British. But, on the other hand, all its directors were Germans resident in Germany. The holders of all its 25,000 shares, except one share, were Germans resident in Germany.

The question for determination was whether, when all the natural persons who expressed and gave effect to their wishes through the corporation as a legal abstraction were Germans resident in Germany, the corporation could sue in this country, because those persons who could not sue were, as matter of law, absorbed in a separate legal person which was British and could sue. The contractual relations constituted by membership in a corporation under the Companies Acts were singular. Where the corporator was an alien enemy those relations might be vitally affected by a state of war. The motive power of the corporation might become paralysed and suspended by the existence of war in a case where every corporator was as an alien enemy under disability as such. Suppose it were the law to allow a sole person to incorporate himself as a company with limited liability and an individual German resident in Germany became incorporated here as a British company, could it be seriously contended that in time of war that alien enemy, because he had acquired a legal corporate name and had an artificial legal existence in this country, was consequently for the present purpose not an alien enemy?

Did it make any difference that there must be two persons, or that the number was seven or 10? The number of corporators in the present company was six. If his judgment were (as, having regard to the judgment of the other members of the Court, he must assume that it was) wrong, the matter was one which called urgently for legislation. The proposition that an alien enemy could not sue rested, he conceived, upon the proposition that such a one could not approach the King, had no resort to the King, and could not invoke the assistance of the King. The Court was the King's Court. To say that the six Germans in the present case could approach the King because it was not

they, but the British corporation, which approached the King seemed to him to be unsound.

The artificial legal entity had no independent power of motion. It was moved by the corporators. It was the German corporator who, under the corporate name, but still German for the relevant purpose of friendliness or enmity, was the person who came He was German in fact, but British in form He thought the appeal should be allowed

Mr. Gore Browne, K. C., and *Mr. Maddock* for Daimler Co., Ld.

Messrs. Leslie Scott, K C, and *Jowitt* for Thomas Tilling, Ld.

Messrs. J. H. Campbell, K C, and *D M Hogg* for the Plaintiffs.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION Before N R CHATTERJEA, J. APPEAL FROM APPELLATE DECREE NO 1116 OF 1911 BAJIT KHAN AND ANOTHER, Plaintiffs, Appellants *v* ATUL CHANDRA CHAKRAVARTI AND OTHERS, Defendants, Respondents Heard, 17th November 1914 Judgment, 5th February 1915

Burden of proof—Kobala—*Consideration, receipt of*—*Recital*—Benami.

The Plaintiffs alleging that they had purchased the *jote* in dispute from the Defendant No. 4, sued for a declaration that a rent decree obtained by the Defendants Nos 1 to 3 against the Defendant No 4, at a rate of rent higher than that payable for the *jote*, was fraudulent and inoperative against the Plaintiffs, and that the *jote* was not liable to be sold in execution of the decree They also prayed for confirmation of possession.

The Defendants Nos 1 to 3, the landlords, did not contest the suit The Defendant No 4 alone contested it, *inter alia*, on the ground that the *kobala* was a *benami* one, and that the Plaintiffs had no right to maintain the suit.

Defendant No. 4 had been a leper for 20 years; he was heavily indebted Plaintiff No. 1 was his sister's husband, and the Plaintiff No. 2 in whose name the *kobala* (which included almost all the properties of the Defendant No 4) was executed was a *khansama* of the Plaintiff No 1. The lands were let out to *burgadars* or *girbidars*. Notwithstanding the *kobala*, the Defendant No 4 had been exercising the right of ownership of the lands all along and that the Plaintiff No. 1 was forced to admit that the Defendant No 4 was in possession of some lands though as a sub-tenant

The primary Court dismissed the suit. The lower Appellate Court came to the conclusion that the *kobala* was *benami* and affirmed the decree of the Court of first instance

The *kobala* itself recited the receipt of consideration The Defendant admitted execution of the *kobala* in favour of the Plaintiff which recited receipt of consideration and which was produced by the Plaintiff The apparent ownership was with the Plaintiff and the Defendant claimed against the tenor of the deed.

Held that the *onus* of proving want of consideration or that the *kobala* was *benami*, under the circumstances was upon the Defendant

Babu Tarack Chandra Chuckerbutty for the Appellants

Babu Kali Kumar Chuckerbutty for the Respondents

A T M *Appeal allowed* *Case remanded.*

CIVIL APPELLATE JURISDICTION Before SHARFUDDIN and COXE, JJ APPEAL FROM ORIGINAL ORDER NO 100 OF 1913 GUJADHAR PROSAD AND ANOTHER, Decree-holders Appellants *v* BINDUBASHINI, Respondent Heard 8th and 9th February Judgment, 12th February 1915

Decree execution of—*Civil Procedure Code (Act V of 1908) secs 47, 50, Or XXI, r 15*—*Legal representative Personal decree against Hindu widow*—*Application by some of the decree holders against the reversioner, if maintainable*—*Legal necessity*

One Sant Protap had two daughters, one of them was named Manjhari She died after the decree The other daughter had two sons named Barnashi and Bindubashini This daughter died leaving the two sons named above Baranashi one of her sons, was also dead After Sant Protap's death, his surviving daughter was the holder of his estate with the limited interest of a daughter His reversioner was Bindubashini. Manjhari died after the

Appellants had obtained a decree against her and the only surviving reversioner, namely Bindubashini, succeeded to the estate of Sant Protap

Manjhari, during the period she held the estate of her father, entered into business dealings with the Appellants, who advanced to her, from time to time various sums of money for necessary purposes, at least it was so alleged in the plaint. On the 13th October 1893 a document, purporting to be a mortgage-deed, was executed by Manjhari in favour of the Appellants in lieu of the previous debts and also for the purpose of meeting with the legal demands against the estate of her father, as for example, Government revenue and other Government demands. The Appellants sued her on that bond and obtained a mortgage decree on the 1st May 1901. Manjhari, the judgment-debtor, appealed to the High Court. The High Court held that the bond could not be treated as a mortgage bond as no witness was examined to say that Manjhari had executed that bond in his presence and gave a personal money decree against Manjhari on the 14th June 1904.

Some of the Plaintiffs of the original suit transferred their share of the decree to Mr. Christian who did not join in the application for execution of the decree.

Gujadhar Prosad and Mahadeo Prosad, two of the three decree-holders, applied for execution of the decree against Bindubashini, the legal representative of the judgment-debtor [illegible] it to recover debts du[illegible] 1909, and sought to sell Manjhari who died in [illegible] But [illegible] belonged to Sant the properties which originall[illegible] [illegible]ncertainty [illegible]ashini as the Protap and then held by Bindub[illegible] considera[illegible] [illegible]ubashini reversioner of Sant Protap. Bind[illegible] from [illegible] at the objected to the execution on the ground th[illegible] und [illegible] against decree having been a personal decree a[illegible] liable Manjhari, the estate of her father was not [illegible] ed by for the satisfaction of the debt incurr[illegible] l that Manjhari. The Subordinate Judge held [illegible] repre- Manjhari not having been sued in her [illegible] ing a sentative character and the decree be[illegible] holder personal decree against her, the decree-[illegible] st the had no right to execute that decree again[illegible] Sant reversioner or against the estate left by [illegible] ing of Protap. He further held that the mean[illegible] s that sec. 50 of the Code of Civil Procedure wa[illegible] plica- all the decree-holders should join in the a[illegible] ristian tion for execution and that as Mr. Ch[illegible] main- had not so joined, the application was not [illegible] to the tainable. The decree-holder applied [illegible] prove Subordinate Judge to adduce evidence to [illegible] ere for that the debts incurred by Manjhari w[illegible] ge did legal necessities. The Subordinate J[illegible]

not allow that on the ground that that would be making a new case in the execution department which was not the case in the plaint and that there was no issue framed with regard to legal necessities.

Held, that the question whether the Respondent was her legal representative or not came within the provisions of sec. 47 of the Code of Civil Procedure.

It is settled law that where the suit is founded upon a purely personal debt or contract of a Hindu woman with a limited interest in the estate, the estate is not bound to satisfy that debt. In order to bind the estate the suit should be so framed as to show that it is not merely a personal demand on the female in possession but that it is intended to bind the entire estate and the interests of all those who came after her. Here the suit was so framed.

A Hindu woman who succeeds as heir whether to a male or to a female, has not complete dominion over the property inherited by her so as to enable her to alienate it otherwise than in case of necessity. If the Government demands cannot be made out of the income and money has to be borrowed to make them, the estate is liable to satisfy those debts. The Appellants were entitled to adduce evidence to prove legal necessities.

That it was not necessary that all the decree-holders should join in the application for execution.

Babus Umakali Mukherjee, Lakshmi Narain Singh and *Baldeo Narain Singh* for the Appellants.

Babus Mahendra Nath Ray, Kulwant Sahay and *Raghunath Singh* for the Respondent.

Appeal allowed:

A. T. M. *Case remanded.*

RAJ KRISHNA RUDRA *v.* PHAKIR DOME.

Defendants into tenants when he sued them for compensation without asking for *khas* possession. But as was pointed out by Lord Halsbury in *Quinn* v. *Leathem* (3), " Every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found. A case is only an authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow logically from it". In the case of *Abdul Hakim Saha* v. *Rajendra Narain Rai* (2) the suit was in respect of excess area added to the original holding of the tenant and it was decided that as in respect of that area the landlord had once sued for use and occupation he must be regarded as having recognised the Defendant as a tenant in respect of it and could not treat him as a trespasser.

We are of opinion that the remarks of the learned Judges in dealing with the particular facts of that case are not of universal application and do not support the proposition that in all cases, in which a landlord sues for compensation for use and occupation of land but does not ask for ejectment of the Defendant therefrom, he waives his right to eject and must be taken to have recognised the Defendant as his tenant. All that was decided in that case, so far as these remarks have any application, was that that particular suit, though framed as a suit for compensation for use and occupation, must be regarded as a suit for rent.

The right to sue for damages for use and occupation is one that is conferred not by the Tenancy Act but by the general law, and we can see no reason why the owner of land should not first sue a trespasser for compensation in expectation that after succeeding in that suit he would be able to get the trespasser to ask for or agree to a settlement. Then if he and the trespasser failed to come to terms, the owner of the land would be compelled to bring a suit for ejectment in order to assert his right to the land. We are therefore of opinion that the lower Courts were wrong in refusing to grant the Plaintiff-Appellant decrees for ejectment against these Defendants. The suits must be remanded for determination of the other issues, which have been left undecided by the Court of first instance. The Respondents will pay the Appellant's costs in this Court. Other costs will abide the result.

Appeal allowed.

(2) 13 C. W. N. 685 (1909).
(3) [1901] A. C. 506.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI
1914,
Heard, 3 and 4, November.
1915.
Judgment, 19, January.

MAHARAJAH SIR RAVANESHWAR PRASAD SINGH BAHADUR and ors., Appellants,
v.
BAIJNATH RAM GOENKA and others, Respondents.

Revenue Sale Law (Act XI of 1859), secs. 5, 6, 13—Separate accounts opened—Residuary share, sale of—Notification, specification of same in, when sufficient—Question of law, but depending for decision on facts of each case, no general rule—Object of specification, to ensure reasonable competition—Calcutta Gazette, publication in, object of.

Act XI of 1859, which is a stringent enactment for the realisation of arrears of revenue, at the same time provides certain safeguards for the protection of the interests of the defaulter, so that he may not

be unnecessarily prejudiced—amongst which are the provisions of secs. 5 and 6 for the issue of notifications of sales specifying the properties to be sold, and their due publication in accordance with the law.

The object of the law as well as of the Board's rules requiring specification of the properties to be sold is to enable likely purchasers among the public to know exactly what was going to be sold and to ensure thereby reasonable competition.

When an estate is advertised for sale, it is not difficult to specify it; in the case of shares of estates the work of specification requires care and attention. No hard and fast rule can be laid down with regard to its sufficiency, for it must vary according to the facts of each particular case. What has to be considered is whether, having regard to all the circumstances, the specification was sufficiently definite and clear to induce likely buyers to appear and bid at the sale. It is not enough that they may go and obtain the requisite information from the Collector's Office. The particulars in the notice should be sufficient in themselves to tell purchasers what they are invited to bid for.

Where out of a revenue unit, which consists of a 15 ans. 6 dams share of Mahal B, and includes 360 villages, 148 separate accounts in respect of specified undivided shares in the said mahal having been opened, the residuary share, commonly called the ijmali *share, was advertised for sale for its arrears; and the notification published in the* Calcutta Gazette *as well as that affixed in the Collector's Office in proceeding to give specification both stated that the* ijmali *share could not be particularised owing to separate accounts having been opened and that what was going to be sold was the share left after excluding the separate accounts of which the numbers in the Collector's register were set out, so that the intending purchaser was left to gather for himself by going through an elaborate process of elimination the property that was advertised for sale:*

Held, *by the Judicial Committee, that they had no hesitation in agreeing with the Trial Judge that the notification in this case was insufficient and irregular and not in compliance with the requirements of the law, and as it appeared on the evidence that the low figure at which the property was knocked down was directly due to the paucity of genuine or substantial bidders in consequence of the absence of proper specification in the sale notification, the sale was set aside.*

The publication of the notice in the Calcutta Gazette *is prescribed with the object of inviting purchasers from other quarters and thus not confining the bidding to speculative money-lenders and muktears of the neighbourhood. This object was not fulfilled in this case where the notification gave little or no particulars.*

This was an appeal from a judgment of the Calcutta High Court, dated 1st May 1907, and arose from a suit to set aside a sale for arrears of revenue. It raised two questions, namely, *first*, whether the specification of the property sold in the sale notification was in accordance with the provisions of the law, and, *second*, whether in case the specification was incomplete, the Plaintiffs had by reason of that irregularity sustained substantial injury.

The Subordinate Judge of Monghyr found in favour of the Plaintiffs, on both questions, but that decision was reversed by the High Court (Rampini and Sharfuddin, JJ.), which in the course of its judgment observed as follows:—

"The next point that arises in this appeal is the question of the specification of *ijmali* share in the notice of sale. Now, the Subordinate Judge has held that the *ijmali*

share was not duly specified in the notice, because the names of the villages which belonged to that share were not set forth in it in detail. He has further held that this was a fatal defect, which made the sale a nullity, and he has laid much stress on the facts that in column 5 of the notice of sale, it is said that 'the *ijmali* share cannot be particularized' (or ascertained) owing to separate accounts having been opened. But it would appear to us that the learned Subordinate Judge is in error on these points. Sections 6 and 13 of Act XI of 1859 do not require that the names of the villages of the share should be specified They only require that the share to be sold should be specified, but do not explain what details are essential to its due specification. It would, therefore, seem to be sufficient if the share to be sold is specified, so that it can be identified and that it can be understood by intending bidders what is about to be sold. This has been laid down in the well-known judgment of Wilson, J, in *Ram Narain Koer* v. *Mahabir Pershad Singh* (1), in which it is said that all that is necessary is that the notification should specify the estate or shares in the estate to be sold, and in selling a share in an estate it is necessary to specify the shares or mauzas of which that share is composed

"The learned Counsel for the Respondent, however, follows the Subordinate Judge in contending that this ruling applies only to a notice of the sale of a share held in common, referred to in sec. 10 of the Act, and not to a share consisting of specific portions of land referred to in sec 11 of the Act, as in the present case. He accordingly relies on the case of *Annada Charan Mukhuti* v. *Kishore Mohan Rai* (2), *Hem Chandra Choudhry* v. *Sarat Kamini Dasya* (3), and *Nibaran Chandra Choudhry* v. *Chiranjib Prasad Bose* (4), and on this ground distinguishes the present case from the cases of *Ismail Khan* v. *Abdul Aziz Khan* (5), and *Dilchand Mahto* v. *Baijnath Singh* (6). But we are unable to find any authority in the terms of Act XI of 1859 for this distinction, and it would seem to us that a notice issued under sec 1 or sec. 11 of Act XI of 1859 is equally good if it can be understood from it what is the share that is to be sold, and if sufficient information on this point is given to intending purchasers Moreover, the judgment of Mr Justice Wilson in *Ram Narain Koer* v. *Mahabir Pershad Singh* (1) deals both with cases in which separate accounts have been opened under sec 10 and with cases in which separate accounts have been opened under sec 11 of the Act. Finally we would say that the rule laid down in the Full Bench case of *Ismail Khan* v *Abdul Aziz Khan* (7), that in such cases as these the question whether in any particular case the notice sufficiently describes what is about to be sold, must depend on the terms of the notification and the circumstances of each particular case, relieves us of the necessity of examining at any length the cases relied on by the learned Counsel for the Respondent as well as for the Appellant. Then the notice in this case, although in it i was said that the *ijmali* share could not be particularized, which in our opinion merely meant that the names of the villages of that share could not be readily given in detail, yet as a matter of fact fully explained the share that was to be sold The vernacular words in column 5 are as follows:—'*Ijmali hissa tasrih nahin ho sakta, kisuaste ke tafriq mauzawar Ihula hai baminhai hissa tafriq ba fard alhida*'; what this means is that 'as separate accounts have been opened village by village, the *ijmali* shares cannot be particularized, except by excluding the separate accounts which are given on a separate sheet of paper'

"It is impossible we consider for any intending purchaser to justly say that he was misled by this description of what was to be sold. It will be seen that it is described as the *ijmali* share, from which were to be deducted the shares for which separate accounts had been opened, as shown in the separate sheet appended to the notification. The other columns of the notice were fully and correctly filled up. No exception is taken to the entries in any of them. The name of the

(1) I. L. R. 13 Cal. 208 (1886).
(2) 2 C. W. N 479 (1892).
(3) 6 C. W. N. 526 (1902).
(4) I. L. R. 32 Cal. 542 (1905).
(5) I. L. R. 32 Cal. 509 (1905).
(6) 8 C. W. N. 337 (1903).
(7) I. L. R. 32 Cal. 502 F. B.) 1905.

mahal, its *tauzi* number, the Government revenue of the estate and the proportionate Government revenue of the share to be sold and the amount of the arrears due for that share are all correctly entered in them. Now, we think that in these circumstances, the notice specified the share to be sold and gave intending purchasers sufficient notice of what was to be put up to auction, for it was perfectly easy to examine the separate sheet and see what was not to be sold, and so to understand that what was to be sold was what remained of the estate It is a legal maxim that '*id certum est quod certum reddi potest*' and it is obvious that it was perfectly possible to understand and ascertain what was to be sold by examining the details of what was not to be sold. This has now been done. It has been exactly ascertained that what Defendant No 1 purchased was 31 villages, for which separate accounts had not been opened. The witness Moula Bakhsh says, it took him 2 or 3 days to find out and draw up a list of the villages of the *ijmali* share, and the witness Korban Ali, a witness for the Plaintiff, states · 'on the 2nd day of the sale, I came to know that some thirty villages were comprised and sold in the *ijmali* share' It is obvious that what has been done now after the sale could have been done before the sale, if any one had chosen to do it But whether the names of the villages were ascertained or not before the sale, there could be no uncertainty as to what was going to be sold at the sale, and the Plaintiff's witness Amir Lal admits that Sukhan Singh, one of the co-sharers for whom a separate account had been opened, 'knew that the disputed *ijmali* mahal was for sale' So too Korban Ali, another witness for the Plaintiff, says; 'one day previous to the sale of the *ijmali* share, I came to know that it would be put up for sale' Again, Balmakund says he came to know from Mukhtar Mahomed Amin that Mauza Lohara was included in the *ijmali* share, and on the strength of this information he bid up to Rs. 33,000. Balmakund must have made enquiries as to the correctness of the information given him by the Mukhtar, as it is not possible to believe that he would go on bidding, without satisfying himself as to this fact, and if he was able to ascertain the fact, it could not have been difficult for others to make similar enquiries. Further, it appears from Exs. BB and BB10 that the *ijmali* share had been put up for sale twice before (Exs. BB2 to BB8), that several shares, for which separate accounts had been opened, had been put up to sale on four previous occasions. So it would seem to us that there is every reason to suppose that intending purchasers at the sale must have had a very good idea what was about to be sold. In support of his argument that where separate accounts have been opened under sec. 11 of the Sale Act, mention of the names of mauzas is necessary, the learned Counsel for the Respondent has drawn our attention to certain forms of notification under sec. 6 prescribed by the Board of Revenue.

"But he has conceded that if an entire estate is about to be sold, it is unnecessary to specify the mauzas of which it is comprised. Now, if an entire estate can be identified without the names of the villages comprised in it being mentioned in the sale notification, we do not see why an *ijmali* estate cannot be identified without mentioning the names of the villages comprised therein The forms prescribed by the Board of Revenue have not the force of law, and they are simply given in the Board of Revenue's Manual by way of examples and the Collectors are directed to follow them '*as far as possible*,' which indicates that these forms in exceptional cases need not be followed

"The learned Subordinate Judge has held that the non-specification of the mauza in the sale-notification was not merely an irregularity but a fatal defect, which made the sale a nullity, and the learned Counsel for the Respondents, Mr. Caspersz, has also pressed this argument upon us. We are, however, of opinion that there was no defect in the sale-notification and that even if there was, it was a mere irregularity which could not have the effect of rendering the sale a nullity For authority for this proposition we need only cite the cases of *Gobind Lal Roy* v. *Ramjanam Misser* (8), and *Tasadduk Rasul Khan* v. *Ahmad Husain* (9), decided by their Lordships of the Privy Council, which seems to have entirely swept away the dis-

(8) I. L. R 21 Cal 70, 71 (1893).
(9) I. L. R. 21 Cal. 66 (1893).

tinction drawn by this Court in the case of *Lala Mobaruck Lal* v. *The Secretary of State* (10) between irregularities that can be cured and illegalities that vitiate a sale and render it a nullity. The case of *Deonandan Singh* v. *Manbodh Singh* (11) is also authority for this view.

"The next point is whether the property was sold at an inadequate price. The Subordinate Judge has held that the property was worth from one and three-quarters to two lakhs of rupees and was sold for Rs. 33,500, which was entirely inadequate. But in the first place the Subordinate Judge seems to be of opinion that a property will fetch the same value at a forced sale as it will at a private sale. This is not the case It is well known that in this country every purchaser of property at a sale for arrears of revenue purchases it subject to the danger of litigation and those Courts which on technical grounds readily set aside Court sales really depreciate the value of property throughout the whole country. This has been pointed out by their Lordships of the Privy Council in the case of *Gobind Lal Roy* v. *Ramjanam Misser* (8), in which it is said:— 'Sales for arrears of revenue are of constant occurrence; anything which impairs the security of purchasers at those sales tends to lower the price of estates put up for sale. It is therefore of the utmost importance in the interest of the revenue-paying population of India that all questions that can arise to the validity of a sale for arrears of revenue should be determined speedily, and that when a sale has once been confirmed by the Commissioner, the purchaser should not be exposed to the danger of having his sale set aside on new grounds'

"Now, if we bear in mind the fact that a property cannot at a forced sale fetch its full market value, and that the costs of the inevitable impending litigation must be taken into consideration by the purchaser, it will be seen that even if the property sold in this case would have fetched more, if sold at a private sale, yet it does not necessarily follow that when sold by the Collector for Rs. 33,500, it was sold at an inadequate price. Indeed after the costs of the litigation in which the auction-purchaser in this case finds himself involved, are defrayed, it is very doubtful if he will have made a good bargain by his purchase. But the learned Subordinate Judge has in our opinion overvalued the property and it is certainly not worth the lakh and three quarters or two lakhs, which he considers it to be worth. He relies on certain *jamabandis*, *raibandis* and oral evidence. We do not attach the same credit to these *jamabandis* as the Subordinate Judge does, and as for the oral evidence the Subordinate Judge himself says with regard to the Plaintiff's witnesses 'no reliance can be placed on their vague statements'."

Hence this appeal.

Sir Erle Richards, K. C., and *Mr. A. M. Dunne* for the Appellants submitted that the sale was illegal and void, inasmuch as the specification of the property sold, in the sale proclamation, did not comply with the provisions of secs. 6 and 13 of Act XI of 1859. The specification of the *ijmali* share in column 5 of the notification was insufficient and misleading. The provisions of the Act and of the rules framed thereunder by the Board of Revenue imperatively required a clear specification of the properties to be sold, in order to enable purchasers to know exactly what was going to be sold. Here no details were given. In fact, it was stated that the *ijmali* share could not be specified, and the bidders or would-be purchasers were left to ascertain for themselves what was going to be sold.

The cases on which the High Court relied did not lay down any general rule. As was pointed out in *Ismail Khan* v. *Abdul Aziz Khan* (7), Act XI of 1859 required that the estate or share must be specified, but what is a sufficient specification, must depend upon the terms of the notification in each case.

(8) I. L. R. 21 Cal. 70, 71 (1893).
(10) I. L. R. 11 Cal 201, 203 (1885).
(11) I. L. R. 32 Cal. 111 (1904).

(7) I. L. R. 32 Cal. 503 (F. B.) (1905).

MAHARAJAH SIR RAVANESHWAR PRASAD SINGH BAHADUR *v.* BAIJNATH RAM GOENKA.

Reference was made to the following authorities:—*Hem Chandra Chowdhry* v. *Sarat Kamini Dasya* (3), *Ram Narain Koer* v. *Mahabir Pershad Singh* (1), Bengal Revenue Manual, 1902, pp. 99-100.

Secondly, by reason of insufficient specification, the property was sold far below its value.

Counsel discussed the evidence on the point, and submitted that the finding of the Subordinate Judge was right.

Mr. L. DeGruyther, K. C., and *Mr. Bhugwandin Dubé* for the Respondents submitted that the specification was quite sufficient and was in conformity with the requirements of the law. The sale notification stated the name of the *ijmali* share or mahal, and its *tauzi* number, and the revenue, and the amount of arrears.

The law required a specification of the "estate" which meant the "mahal." The object of the law regarding specification was to identify the property to be sold, and the details given in the sale notification were sufficient to identify the property.

Both the Collector and the Commissioner were of opinion that the specification in question was as clear and definite as it could be under the circumstances. Persons desirous of bidding at the auction would have had no difficulty to ascertain the names and area of the villages that were going to be sold.

Reference was made to the following authorities:—

Amirunessa Khatoon v. *The Secretary of State for India in Council* (12), *Ram Narain Koer* v. *Mahabir Pershad Singh* (1), *Dilchand Mahto* v. *Baijnath Singh* (6), *Ismail Khan* v. *Abdul Aziz Khan* (7) and *Ismail Khan* v. *Abdul Aziz Khan* (5).

In any case the Plaintiffs had failed to establish that substantial injury had been caused to them by reason of the irregularity complained of. Counsel discussed the evidence, and submitted that the finding of the High Court was correct.

Sir Erle Richards replied.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This is an appeal from a judgment and decree of the High Court of Bengal, dated the 1st of May 1907, and the question for determination relates to the validity of a sale for arrears of revenue held under Act XI of 1859 of a share of an estate called Mahal Bisthazari situated in the district of Monghyr.

The case offers an illustration of the extreme complexity of the land-system existing in Bengal. A 15 annas 6 dams share of Mahal Bisthazari seems to have been in existence as an independent fiscal unit for a considerable time. It includes 360 villages, and in the Collector's register is entered as bearing Tauzi No. 336, which marks its position as a separate revenue-paying estate.

As is usually the case in Bengal and elsewhere in India, a large number of persons possess proprietary rights in this mahal; they own specific shares, some in one village only, others in several villages. Ordinarily the whole estate held in this wise is liable to be put up for sale for default in the payment of Government revenue. But Act XI of 1859, which lays down the rules for the realisation of the revenue payable to the State, provides (by sec. 10) that "a recorded sharer of a joint estate held in common tenancy," or (by sec. 11), "a recorded sharer of a joint

(1) I. L. R. 13 Cal. 208 (1886).
(3) 6 C. W. N. 526 (1902).
(6) 8 C. W. [illegible] 337 at p. 338 (1903).
(7) I. L. R. 32 Cal 502 (F. B.) (1905).
(12) I. L. R. 10 Cal. 63 (1883).
(5) I. L. R. 32 Cal. 509 (1905).

share whose share consists of a specific portion of the land of the estate," may apply to the Collector to open a separate account for the payment of his share of the revenue separately from the others. These separate accounts in respect of separate shares ensure that no share of an estate other than the one in respect of which the default had occurred should be exposed to sale (sec. 13) until and unless the highest offer for that share does not equal the amount of the arrear (sec. 14), when the whole estate becomes liable to be put up to sale.

In accordance with the provisions of secs. 10 and 11 of Act XI of 1859, 148 owners of specific but undivided shares in Mahal Bisthazari applied for and obtained from the Collector separation of accounts. This left, however, a large residue, commonly called the *ijmali* or joint share, the owners of which remained jointly liable for the revenue due in respect thereof.

In August 1901, this *ijmali* share was found to be in arrears for the March and June *kists* or instalments of Government revenue, amounting to Rs. 601, and it was advertised for sale on the 9th of September 1901. An application appears to have been made to the Collector for postponement of the sale, which, however, was refused, and the sale was held on the advertised date, when the property was purchased by the Defendant-Respondent, Baijnath Goenka, for a sum of Rs. 33,500.

An appeal to the Commissioner of the Division, preferred by the owners of the *ijmali* share, under sec. 25 of the Act, having been dismissed, the Plaintiffs brought their suit in the Court of the Subordinate Judge of Monghyr for the annulment of the sale. The grounds on which they base their action are exactly the same as those they urged before the Commissioner. These grounds are set forth with sufficient distinctness in the 18th paragraph of the plaint, sub-cl. (*e*), which is in these terms :—

"That the description of the *ijmali* share given in column 5 of the said notification was incorrect, insufficient, and misleading, and, having regard to the nature of the interests included in the said *ijmali* account and to the fact that it was constantly fluctuating, a fuller and more specific description thereof, with particular reference to the villages and the diverse interests making it up, should have been given, all materials for the same being available to the Collector in his office. The omission to give such detailed description of the *ijmali* account has largely affected the sale and value of the property sold."

Shortly stated, the points at issue resolve themselves into two questions—one of law and the other of fact : (1) Whether, having regard to the purpose in view, the specification of the property in the sale-notification was in accordance with the provisions of the law ; and (2) whether, in case the requirements of the law had not been complied with, the Plaintiffs, by reason of the irregularity, had sustained substantial injury.

The Trial Judge found both questions in favour of the Plaintiffs. He held in effect that the specification was insufficient and defective, and that in consequence thereof the property was sold at a gross undervalue. He accordingly made a decree annulling the sale. The High Court, on appeal, came to a directly opposite conclusion on both points, and reversing his judgment, have dismissed the Plaintiffs' action.

In these circumstances it becomes necessary, in their Lordships' opinion, to consider carefully the description or specification which the Trial Judge holds to be insufficient and irregular, and which the High Court, on the other hand, regard as sufficiently complying with the requirements of the law.

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Act XI of 1859 is a stringent enactment for the realisation of arrears of revenue; at the same time it provides certain safeguards for the protection of the interests of the defaulter so that he may not be unnecessarily prejudiced. Among these safeguards are the provisions of secs. 5 and 6 for the issue of notifications of sales specifying the properties to be sold and their due publication in accordance with the law. And an exact compliance with its requirements is considered so important by the Government that the Board of Revenue has issued special rules, with forms of notification necessary in the case of estates or shares of estates advertised for sale. The object of the law as well as of the Board's rules requiring specification of the properties to be sold is clearly to enable likely purchasers among the public to know exactly what was going to be sold, and to ensure thereby reasonable competition. When an estate is advertised for sale it is not difficult to specify it; in the case of shares of estates the work of specification requires care and attention. No hard and fast rule can be laid down with regard to its sufficiency, for it must vary according to the facts of each particular case.

In the present case the notification under secs. 6 and 13 of the Act was affixed in the Collector's office and in the Court of the Judge of the district; and as the revenue payable in respect of the *ijmali* share exceeded Rs. 500, it was also published in the *Calcutta Gazette*, which is the official gazette prescribed in the Act In this notification, which bears date the 7th of August 1901, what purports to be a specification of the share to be sold is in these terms: "*Ijmali* share which cannot be specified excluding the separate accounts numbers--." Then follows a long list of the 148 separate accounts already referred to. And at the end the following words occur: "All other shares besides that specified are excluded from the sale."

In the sale-notification issued on the 6th of August 1901, which was apparently the one affixed in the Collector's office, the entry in column 5 (the specification column) is as follows:—

"The *ijmali* share cannot be particularised owing to separate accounts having been opened The share to be sold are those (*sic*) given in a separate sheet after excluding the share in respect of which the separate accounts have been opened."

The learned Judges of the High Court have given in their judgment a translation of the vernacular words in the notice. It is not necessary to consider whether their rendering is quite correct. For the fact remains that admittedly there was no specification of the share to be sold beyond what has already been stated. The intending purchaser was left to gather for himself by going through an elaborate process of elimination the property that was advertised for sale, and for which he was expected to bid. It is to be observed that the publication of the notice in the *Calcutta Gazette* is prescribed with the object of inviting purchasers from other quarters and thus not confining the bidding to speculative money-lenders and muktears of the neighbourhood, which is hardly likely where the notification gives little or no particulars, as in this instance, in respect of the property advertised for sale.

The cases to which their Lordships' attention has been invited give, in their opinion, no assistance in the determination of the point at issue here. As already observed, each case must depend on its own particular facts; what has to be considered is whether, having regard to all the circumstances, the specification was sufficiently definite and clear to induce likely buyers to appear and bid at the sale.

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It is not enough that they may go and obtain the requisite information from the Collector's office. In their Lordships' opinion the particulars in the notice should be sufficient in themselves to tell purchasers what they are invited to bid for.

Their Lordships, therefore, have no hesitation in agreeing with the Trial Judge that the notification in this case was insufficient and irregular, and not in compliance with the requirements of the law.

Sec. 33 provides that no sale should be set aside on the ground that it was made contrary to the provisions of the Act, unless the Plaintiff proves that he has sustained "substantial injury" by reason of the irregularity complained of. The Trial Judge found that the property was worth a lakh of rupees, and that in consequence of the irregularity in the sale-notification the Defendant was enabled to buy it for one-third of its value.

The learned Judges of the High Court, after an elaborate calculation, thought that, considering the mortgages on the property, it had fetched at the sale a fair value. In view of this divergence of opinion their Lordships have examined the evidence for themselves, and they have come to the conclusion that the view of the Trial Judge, both as regards the value and the fact that the lowness of the price was due to the defectiveness of the notice, was well-founded. With respect to the value, the weight of evidence is clearly on the side of the Plaintiffs; whilst a reference to the bid-sheet and the testimony of Balmakund and Korban Ali leave little room for doubt that the low figure at which the property was knocked down was directly due to the paucity of genuine or substantial bidders in consequence of the absence of proper specification in the sale-notification.

Their Lordships cannot help regretting that the Commissioner did not annul the sale on the appeal preferred to him, which would have saved a long and harassing litigation extending over 12 years.

Their Lordships are of opinion that the judgment and decree of the High Court ought to be set aside and the decree of the Subordinate Judge restored, save and except as to villages Matasi and Mirzaganj, in regard to which the claim is permitted to be withdrawn, with liberty to the Appellants to institute a fresh suit in respect thereof, if so advised. The Respondents must pay the cost of this appeal and of the appeal in the High Court. And their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Watkins* and *Hunter* for the Respondents.

B. D. *Appeal allowed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 250 OF 1912.

MOOKERJEE, J.
WALMSLEY, J.
1914,
Heard, 16 and 17, July.
Judgment, 21, July.

GOBINDA CHANDRA SHAHA and another, Appellants,
v.
DWARKA NATH PATITA, Respondent.

Transfer of Property Act (IV of 1882), secs. 106, 107, 116—Evidence Act (I of 1872), sec 114—Lease without registered instrument for purposes other than agriculture or manufacture at a fixed rent a year without any settlement as to duration of tenancy—Effect of holding over with acceptance of rent by landlord—Notice necessary to terminate tenancy, nature of—Notice signed by am-mooktear if valid—Fifteen days from date of notice, calculation of—Service of notice by registered post—Post mark, evidentiary value of, in absence of oral evidence as to date of posting and receipt at office of destina-

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tion—Endorsement by post office returning registered cover as re used by addressee, admissibility of—Presumption i arises from such endorsement as to date of tender to addressee

The Defendant took the premises in suit for a stationery shop as a tenant from the commencement of the Bengali year, the rent being fixed at a certain amount a year, but the period during which the tenancy was to continue was not settled The tenant continued in occupation after the end of the year and the landlords accepted rent for the next year. The Plaintiff landlords subsequently served a notice to quit by registered post. The notice was signed by an am-muktear *and was dated the 16th Baisakh and called upon the Defendant to vacate the premises within the 31st Baisakh. The registered cover which was addressed to the Defendant at his place of business was returned to the sender by the Postal authorities with an endorsement that the addressee had refused to accept it. There was no oral evidence to show where the cover was posted or when and where it was tendered to the Defendant. On the cover were the seals of the office of posting and the office of destination as also an endorsement that the letter was returned as the addressee refused to receive it, the seals and the endorsement bearing date corresponding to the date of the notice.*

Held—*That under sec. 107 of the Transfer of Property Act which was in force at the time a lease of immoveable property from year to year or for any time exceeding one year or reserving a yearly rent could be made only by a registered instrument and consequently the Defendant became a tenant for one year only and in the absence of an agreement to the contrary within the meaning of sec. 116 of the Act, the effect of his holding over was that after the expiry of the year in which the tenancy took effect, it was renewed from month to month and was terminable by the lessors by fifteen days' notice expiring with the end of a month of the tenancy.*

That the notice was a fifteen days' notice and was properly signed.

It was not intended to lay down in SUBADANI *v.* DURGA CHARAN (8) *that in calculating the 15 days the day on which the notice was served as also the date on which the notice expired were both to be excluded.*

That the preponderance of judicial authority is in favour of the view that what purports to be the impression of a post office seal on an envelope which has been posted may be presumed to be genuine, at any rate, when its genuineness is not expressly questioned; that the post mark when proved or assumed to be genuine implies an assertion that the date on the mark is the date of affixing it, that it is evidence that the place or office mentioned therein was actually the place where it was affixed and from the date in the post mark of the office of posting on the cover it might be inferred that the letter was posted at that office on that date and from the date in the post mark of the office of destination it might be inferred that the letter reached that office on that date, but the endorsement on the cover was not admissible in evidence in proof of the allegation that the cover was tendered to and refused by the addressee on the date of the endorsement and in the absence of any evidence on this point and the cover being addressed to the Defendant at his place of business which there was nothing to show was his residence within the meaning of sec. 106, the Plaintiff failed to prove that the notice was duly served on the Defendant.

(8) I. L. R. 28 Cal. 118 : s. c. 4 C. W. N. 790 (1900).

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That proof of the fact that a letter correctly addressed has been posted and has not been received back through the Dead Letter Office may justify the presumption that it had been delivered in due course of mail to the addressee, but proof of the fact that a letter has been duly posted and has been returned by the Postal authorities does not justify the presumption that it has been so returned, because it has been refused by the addressee, much less is there a presumption that the cover has been tendered to the addressee on a particular date.

The presumption mentioned in sec. 114 of the Evidence Act is not a presumption of law but a presumption of fact and where as in the present case the Defendant pledges his oath that the cover was never tendered to him the Court could not treat the presumption of regularity of official business as conclusive against him.

This was an appeal from a decision of Maulvi Ali Ahmad, Subordinate Judge, Dacca, dated 1st March 1913.

The material facts will appear from the judgment.

Babus Baidya Nath Dutta, Benode Behari Mukherjee, and *Satindra Nath Mukherjee* for the Appellants.

Babu Gunada Charan Sen, for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal on behalf of the Plaintiffs in a suit for ejectment of the Defendant, on the allegation that he held as a tenant of the disputed premises from month to month and had failed to vacate the land in spite of service of notice to quit; the Defendant resisted the claim on the ground that his tenancy had not been validly terminated. The Subordinate Judge has given effect to this contention and has dismissed the suit; on the present appeal, three points have emerged for consideration, namely, *first*, was the Defendant, as alleged by the Plaintiffs, a tenant from month to month, entitled only to fifteen days' notice to quit; *secondly*, was the notice in proper form: and, *thirdly*, was the notice served in accordance with law?

As regards the first question, the case for the Defendant is that he took the premises from the commencement of the Bengali year 1306, that the rent was fixed at Rs. 275 a year and that the period during which the tenancy was to continue was not settled. It is plain that the Defendant became a tenant for one year only, for a rent of Rs. 275; because, under sec. 107 of the Transfer of Property Act which was in force when the tenancy was constituted, a lease of immoveable property from year to year or for any term exceeding one year, or reserving a yearly rent could be made only by a registered instrument. The position, consequently, was that the tenancy would, in ordinary course, expire at the end of the year 1306. The tenant, however, continued in occupation and the landlords accepted rent from him for 1307; in other words, the tenant held over, the legal effect whereof is deducible from sec. 116 of the Transfer of Property Act. That section, we quote only so much of it as is applicable to the present case, is in these terms: "If a lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for

which the property is leased as specified in sec. 106." In the case before us, the lease was neither for agricultural nor for manufacturing purposes within the meaning of sec. 106, as the Defendant had taken the property for a stationery shop. The lease was consequently renewed, *primâ facie*, from month to month. The question next arises, whether there was "an agreement to the contrary" within the meaning of sec. 116. As was pointed out by Maclean, C. J., in *Trailokyanath v. Sarat Chandra* (1), the agreement mentioned means an agreement as to the terms of the holding over. Now, there is no proof of an express agreement as to the terms on which the tenant was to hold over. But it is argued that as the rent was originally agreed to be an annual rent, there was an implied agreement that if the tenant held over, he should hold over from year to year. This argument is obviously fallacious. Let us assume that the mode in which the rent is expressed to be reserved, for example at so much a year, affords a presumption that the tenancy is of a character corresponding to it [*Wilkinson* v. *Hall* (2)], though it is plain that the rule is not of universal application and the presumption of a yearly taking does not always arise from the rent being payable yearly [*Atherstone* v. *Bostock* (3), *Wilson* v. *Abott* (4)]. The argument for the Defendant in substance is that the lease was for one year, coupled with an implied agreement that the tenant would hold over from year to year; this, in substance, would be a lease from year to year, which under sec. 107 could not be created except by a registered instrument. In fact, this is an ingenious attempt to substitute for a lease from year to year, a tenancy for one year coupled with an agreement to renew it from year to year [*Motilal* v. *Darjeeling Municipality* (5)]. We hold accordingly that there was no "agreement to the contrary" within the meaning of sec. 116, and that after the expiry of the year in which the tenancy took effect, it was renewed from month to month [*Debendra Nath* v. *Shyama Prasanna* (6), *Durginikarini* v. *Gobardhan Bose* (7)]; under sec. 106, this tenancy was terminable by the lessors by fifteen days' notice expiring with the end of a month of the tenancy.

As regards the second question, two objections have been taken to the form of the notice, namely, *first*, that the notice, which was dated the 16th Baisakh 1318 and may, for the present purpose, be assumed to have been served on that date, called upon the Defendant to vacate the premises "within" (that is, not later than) the 31st Baisakh 1318; and, *secondly*, that the notice was signed on behalf of the first Plaintiff by one Bharat Chandra De. These objections are manifestly groundless. A notice served on the 16th Baisakh which calls upon the tenant to quit on the 31st Baisakh (the last day of that month) gives the tenant fifteen days' notice excluding the day on which the notice is served and expiring with the end of a month of the tenancy. The case of *Subadini* v. *Durga Charan* (8), upon which much stress has been laid by the Defendant, is clearly distinguishable. In that case, the notice was served on the 16th Falgun and required the tenant to quit the land on the 30th Falgun. It was contend-

(1) I. L. R. 32 Cal 123 (127): s c 8 C. W. N. 501 (1904).
(2) 3 Bing. N. C. 508; 43 R. R. 728 (1837)
(3) 8 M. and G 511 (1841).
(4) 3 B. and C. 88 (1824).
(5) 17 C L J 167 (1912).
(6) 11 C. W. N. 1121 (190).
(7) 24 I C. 183 (1914)
(8) I. L R. 28 Cal. 113: s. c 4 C. W. N 790 (1900).

ed on behalf of the landlord that if the day on which the notice was served was taken into account, the tenant had fifteen days' notice. This contention was overruled, and it was held that he had only fourteen clear days' notice, while he was entitled under sec. 106 to fifteen clear days' notice. It is plain that the learned Judges took into account the day on which the notice was to expire and excluded from calculation only the day on which the notice was served. The learned Judges plainly could not have intended to use the expression "clear days" in its technical sense that the time is to be reckoned exclusive of both the first and last days [*R.* v. *Herefordshire* (9) and *Liffin* v. *Pitcher* (10)]. The judgment, taken as a whole, indicates conclusively that when they laid down that the fifteen days' notice mentioned in sec. 105 meant fifteen clear days' notice, they never intended to hold that, in calculating the fifteen days, the day on which the notice is served, as also the date on which the notice expires, are both to be excluded. This is in accord with what may be taken as the well settled rule on the subject. [*Rex* v. *Grafton* (11), *Doe* v. *Matthews* (12) and *Poole* v. *Warren* (13).] The contention that the notice was not a fifteen days' notice to quit must consequently be overruled. The second objection that the notice was not signed by the first Plaintiff is equally untenable. Sec. 106 requires the notice to be in writing signed by or on behalf of the person giving it. The notice in this case was signed by Bharat Chandra De, *am-muktear* of the first Plaintiff Hari Dass Shaha. The power-of-attorney has not been produced, but the Defendant admitted that he was the *am-muktear*. The objection is clearly untenable, as the notice was signed by an authorized agent.

As regards the third question, we have to consider whether the notice was served in accordance with the second paragraph of sec. 106 which provides as follows:—"every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property." In this case, attempt was made by the Plaintiffs to comply with the requirements of the law by forwarding the notice to the Defendant in a registered cover through the post office. The cover was ultimately returned to the Plaintiffs by the Postal authorities on the allegation that the addressee had refused to accept it. The cover with the notice contained therein has been produced in the course of the trial. There is no oral evidence to show when the cover was posted, nor has the postal peon been examined to prove when and where the cover was tendered to the Defendant. The only oral evidence on the subject is a statement by the agent of the Plaintiff who pledges his oath that he had given notice by a registered cover. The Defendant, on the other hand, asserted in the course of his deposition that the cover in question had never been tendered to him. In these circumstances the question requires consideration, whether the Plaintiffs have proved that the notice was tendered either personally to the Defendant or to one of his family or servants at his residence, at least fifteen days before the expiry of the month of Baisakh, that is, not later than the 16th Baisakh. The

(9) 3 B. and Ald. 581 (1820).
(10) 1 Dowling N. S. 767 (1842).
(11) 18 Q. B. 498; 88 R. R. 678 (1852).
(12) 11 C. B. 675 (1851).
(13) 5 A. and E. 557 (1836).

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evidence for the determination of this question consists of the envelope and its contents (the notice). The notice, on the face of it, is dated the 16th Baisakh, 1318.

The envelope is addressed to the Defendant: "Dwarkanath Patita, P. O. Narayangunj, Bhagwangunj Bazar, Nij Gadi." In a corner is the following endorsement "from Madangunj, Gobindachandra Shaha" (the second Plaintiff); on the three postage stamps affixed to the envelope, we have what purport to be impressions of the seal of the Madangunj Post Office, each bears date the 29th April 1911, which corresponds to the 16th Baisakh 1318. We have also a very faint and almost illegible impression of the seal of the Narayangunj Post Office, dated the 29th April 1911. We have further an impression of the seal of the Madangunj Post Office, dated the 1st May 1911. In addition, we have two endorsements on the cover in the following terms:—

(1) "This letter returned as the addressee refused to receive it. No. 5 29-4-1911."

(2) "Refused and returned to sender. J. C. G. 1-5-1911."

The first of these endorsements is in Bengali and the second is in English. The first point for determination is, when was the letter posted? There is, as we have said, no oral evidence on the subject and we are left entirely to the post marks on the envelope. The use of a post mark in evidence involves at least three distinct principles. In the first place, the question arises, may it be inferred from the presence of what purports to be the official mark, that the mark was genuinely affixed by an officer of the post office concerned? This is a question of authentication and may be answered in the affirmative, though there has been some fluctuation of judicial opinion on the subject. In *R.* v. *Johnson* (14), an objection to the use of an Irish post mark as evidence of a posting in Ireland, to the effect that "there was no evidence that either of the papers was received from the post office which might have been ascertained by the persons employed in that office," was not sanctioned. In *R.* v. *Watson* (15), a post mark was held not sufficient to show posting at the place named. In *Arcangelo* v. *Thompson* (16), a post mark was assumed genuine in proving receipt of a letter in a certain year. In *R.* v. *Plumer* (17), post office marks were used to shew that a letter came to a particular office and similarly in *Hitchon* v. *Best* (18), a post mark was presumed to be genuine. In *Fletcher* v. *Praddyll* (19), a postmistress was called to identify a post mark. In *Abbey* v. *Lyll* (20), Gase'ee, J., said—"when it is disputed, it ought perhaps to be proved, though what might be deemed to amount to proof is not clear." In *Warren* v. *Warren* (21), the postmaster of one of the offices was called to prove the post mark. In *Shiply* v. *Todhunter* (22), and *Stocken* v. *Collen* (23), post marks were presumed genuine. But in *Wood Cock* v. *Houldsworth* (24), it was said that some witness must prove the post marks. In the United States there are cases in which post marks have been presumed genuine: *New Haven* v. *Mitchell* (25);

(14) 7 East 65 (66, 70) (18'5).
(15) 1 Camp. 215 (1808)
(16) 2 Camp 620 (23 (1811).
(17) Russ and Ry. 264 (1814).
(18) 2 B. and B 299 (1819).
(19) 3 Stark 64 (1821).
(20) 5 Bing 299 (1829).
(21) 1 C. M and R. 250 (1834).
(22) 7 C. and P. 680 (68c) (1836).
(23) 7 M and W 515 (1841).
(24) 16 M and W. 124 (1846)
(25) 15 Conn. 206 (225).

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Burgess v. *Clark* (26). The preponderance of Judicial authority is in favour of the view that what purports to be the impression of a post office seal on an envelope which has been posted may be presumed to be genuine, at any rate, where its genuineness is not expressly questioned.

In the second place, the question arises, whether, if the post mark be taken as genuine, it is evidence that the cover bearing it was stamped on the date the impression bears. The answer has been given in the affirmative. In *Canning's Trial* (27), a post mark, verified as authentic by the clerk, was admitted to show that the cover passed through the office on the date of the mark. In *Fletcher* v *Braddyll* (19), a post mark was used to show that the letter existed on the date thereof. In *Abbey* v *Lyll* (20), a post mark on the cover was used to show that the enclosed letter was wrongly dated. In *Stocken* v. *Collen* (23), a post mark was used to shew the hour of posting a notice. These cases show that the post mark when proved or assumed to be genuine, implies an assertion that the date on the mark is the date of affixing it. In the third place, on the same principle the post mark is evidence that the place or office mentioned therein was actually the place, where it was affixed: *Canning's Trial* (27); *R.* v. *Johnson* (14). We may consequently infer from the date in the three post marks on the three postage stamps on the cover, that the letter was posted at Madangunj, on the 29th April 1911. It is necessary to rely on the date in the post marks, because the mere fact that the notice is dated the 29th April 1911, does not show that it must have been posted on the same date. As was said in *Phelan* v. *H. W. Mutual Life Ins. Co.* (28), experience indicates no such uniform connection between the date of a letter and the time of its mailing as to raise an inference that a letter was posted on the day of its date. The next question, which requires consideration, is, when was the cover tendered to the addressee. For this purpose, it would be necessary to know the usual course of mail between the place of posting and the place of receipt, for the inference is that the article posted was delivered in due course of post [*Pitts* v *Hartford* (29)]. We have here no evidence on the subject, and the Court cannot take as matters of public notoriety the running time of trains between two places on a particular day, the number of mail trains within a given time and other like facts involved in such an enquiry [*Wiggins* v. *Burkham* (30)]. We are, therefore, obliged to rely upon the date in the post mark of the Narayangunj Post Office. This shows that the cover reached that office on the very date it was posted at Madangunj, *i e.*, 29th April 1911; but it does not follow that it was tendered to the addressee on the same date, as was said in *Early* v *Preston* (31), the date of delivery of an article sent by mail cannot necessarily be inferred from the post mark of the receiving office; this observation applies with special force to registered articles which are delivered by the post office only between specified working hours. The Plaintiffs are, consequently, driven to rely upon the vernacular endorsement on the cover, and this leads to

(14) 7 East 66 (66, 70 (805)
(19) 3 Stark 64 (182).
(20) 5 Bing. 298 (1829).
(23) 7 M. and W. 515 (1841).
(26) 8 Ind. 250.
(27) 19 How S. and Tr. 370 (1754).
(28) 113 N. Y. 147 ; 10 Am St. Rep. 441.
(29) 66 Conn. 376 , 50 Am St Rep 96.
(30) 10 Wallace 129.
(31) 1 Patt and H. 228.

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the question, whether that endorsement is admissible in evidence. The endorsement is not signed, but it is urged that it must have been made by the peon No. 5 who was probably entrusted with the delivery of the letter to the addressee. Assume the endorsement to be genuine; but still there remains the question, whether it is admissible in proof of the fact recited therein, namely, that the cover had been tendered to the addressee on the 29th April 1911, and had been refused by him. This plainly is at best a record of a statement by the peon. Such a statement would have been admissible under sec. 32 (*2*) of the Indian Evidence Act, if it had been proved that the peon was dead or could not be found or had become incapable of giving evidence or that his attendance could not be procured without an unreasonable amount of delay or expense. No foundation, however, has been laid for the reception of the evidence under sec. 32 (*2*). The only other section which deals with statements by persons who cannot be called as witness, namely, sec. 33 has no application. Nor can any assistance be derived from the group of sections relating to statements made under special circumstances. It cannot be argued with any show of reason that the endorsement is admissible, because it is a statement made by a public officer in the discharge of his duty; our attention has not been drawn to any provision of the Indian Evidence Act, which would make a statement admissible on such a ground, indeed, if such a ground for admission of evidence was recognised, sec. 32 (*2*) would be superfluous. The inference follows, accordingly, that the vernacular endorsement on the cover mentioned above is not admissible in evidence in proof of the allegation that the cover was tendered to and refused by the addressee on the 29th April 1911. But it has been argued that this view is opposed to the decision in *Jogendra Chandra* v. *Dwarkanath* (32). That case, however, if it be assumed to have been correctly decided, is clearly distinguishable. There a suit was brought for ejectment of a tenant of an agricultural holding, and the question arose whether the tenancy had been terminated by service of notice to quit. The Plaintiffs alleged that they had sent a notice to the Defendant in a registered cover duly posted, which had been returned to them by the Postal authorities on the allegation that it had been refused by the addressee. The Courts below held that these facts were proved, but it does not transpire from the judgments, on what evidence this conclusion was based; both Courts, however, held that there was no service of notice, as the Defendant had not opened the letter and become acquainted with its contents. The Plaintiffs appealed to this Court on the ground that the bare fact of refusal to take and open the registered cover did not entitle the Defendant to plead non-service of notice. In the course of the argument for the Appellants in this Court, reference was made by their counsel to sec. 16, illus. (*b*), of the Indian Evidence Act and to the cases of *Papillon* v. *Branton* (33), and *Looif Ali* v. *Pearee Mohun* (34); the attention of the Court was also drawn to evidence of service of notice; we have not been able to ascertain what particular evidence of service had been given, as after this lapse of time the record must have been destroyed. On the evidence on the record and on the arguments mentioned, the Court made the following observation:

(32) I. L. R. 15 Cal. 681 (1888)
(33) 5 H. and N. 518 (1860).
(34) 16 W. R. 228 (1871).

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" the service of the notice in another form (that is, other than service by actually handing the notice) was, however, proved, having been effected by a registered letter, the posting of which was proved and which was produced in Court in the cover in which it was despatched, that cover containing the notice, with an endorsement upon it purporting to be by an officer of the post office stating the refusal by the Defendant to receive the document. Upon the cases cited before us, *viz.*, *Looth Ali* v. *Pearee Mohun* (34), and *Papillon* v. *Branton* (33), and having regard also to sec. 16, illus. (*b*), of the Evidence Act, we think that only a captious doubt could lead us to regard that service as insufficient." It has been argued that the learned Judges held solely on what purported to be an endorsement by an officer of the post office that the cover had been tendered to and refused by the addressee. If the learned Judges intended to lay this down as a matter of law, it is worthy of note that the question of the admissibility of the endorsement was not argued before them: if there was evidence to show that the peon was dead or not available, the endorsement might be admissible under sec. 32 (2) of the Indian Evidence Act. In the absence of information as to evidence of service of notice to which the attention of the Court was drawn, we are not prepared to treat the decision as a binding authority in support of the proposition that an endorsement of the description now before us is admissible in evidence, though the requisite conditions for admissibility mentioned in sec. 32 have not been fulfilled. We may further point out that the wide interpretation suggested by the Plaintiffs is not justified by the authorities mentioned in the judgment; illustration (*b*) to sec. 16 is in these terms: "the question is, whether a particular letter reached A. The facts that it was posted in due course and was not returned through the Dead Letter Office are relevant." This is very different from the assertion that if the letter is returned with a note thereon by the peon that it had been tendered to and refused by the addressee, the inference follows that it was so actually tendered and refused. The case of *Looth Ali* v. *Pearee Mohun* (34) was decided before the Indian Evidence Act came into force and cannot be treated as an authority on the question of the admissibility of evidence under sec. 32 (2); but the facts are so meagrely stated in the judgment that, even treated as such authority, it is quite inconclusive; all that appears is that one of the Plaintiffs sent a notice to the Defendant in a cover, which was refused by the addressee, came back to the hands of the sender and was produced in Court. What evidence there was on the point does not appear, but we have the following observation in another part of the judgment, "that letter was forwarded to him by post duly registered and we must presume that it was tendered to him; he, therefore, cannot take advantage of his refusal to take it." The case of *Papillon* v. *Branton* (33) was of a very different character. There the tenant posted a notice to the agent of the landlord on the morning of the 25th March 1859. The agent was in his office until 6 or 7 o'clock in the evening: he did not receive the letter, but found it the next morning. The Jury found upon all these circumstances that as the letter had been posted in the morning and had to be carried from Waterloo Place to the Temple, it must

(33) 5 H. and N. 518 (1860).
(34) 16 W. R. 223 (1871).

(33) 5 H. and N. 518 (1860).
(34) 16 W. R. 223 (1871).

have reached the office of the agent the same evening, probably after he had left. An application was made to set aside this verdict, but the Exchanger Chamber declined to grant a rule. This again is clearly a very different case from that of *Jogendra Chandra* v. *Dwarkanath* (32). It may be further observed that in a case under the Transfer of Property Act [*Subadani* v. *Durga Charan* (8)], where reference is made to *Rajani* v. *Hafisaunisa* (35), it was said that service of notice by a registered letter through the post office is not necessarily a non-compliance with the provisions of sec. 106, if there is evidence that the peon tendered or delivered the notice either personally to the party or to one of his family or to his servant. In both these cases receipts signed by the addressee were produced, and that clearly was sufficient proof of good service. The case of *Ismail Khan* v. *Kali Krishna* (36) does not carry the matter further than *Jogendra Chandra* v. *Dwarkanath* (32). Finally the decision in *Jogendra Chandra* v. *Dwarkanath* (32) is no authority for the proposition that the cover must be assumed to have been tendered to the addressee on the particular date, if any, which the endorsement may bear. Neither in *Jogendra Chandra* v. *Dwarkanath* (32), nor in *Lootf Ali* v. *Pearee Mohun* (34), did any question arise as to the particular date on which the notice had been served. On that question no assistance can be derived from the principle embodied in sec. 16 of the Indian Evidence Act, namely, that when there is a question whether a particular act was done, the existence of any course of business according to which it naturally would have been done is a relevant fact. In the case before us, the Plaintiffs can succeed only upon proof that on the 29th April 1911, the cover was tendered either personally to the Defendant or to one of his family or servants at his residence and was refused by the Defendant. The vernacular endorsement is not admissible for this purpose and cannot be treated as evidence of the events recited therein. Nor would sec. 114 of the Indian Evidence Act and illustration (*f*) thereto, which are mentioned in the case of *Mir Tapaura Hossain* v. *Gopi Narayan* (37), be sufficient to remove the difficulty in the way of the Plaintiffs; even if we presume it as likely that the cover was tendered to the addressee, we cannot assume that it was so tendered on the 29th April 1911, yet such assumption is essential for the success of the Plaintiffs. Proof of the fact that a letter correctly addressed has been posted and has not been received back through the Dead Letter Office may justify the presumption that it had been delivered in due course of mail to the addressee, but proof of the fact that a letter has been duly posted and has been returned by the Postal authorities does not justify the presumption that it has been so returned because it has been refused by the addressee, for it may well be that it has been returned because the addressee has not been found; much less is there a presumption that the cover has been tendered to the addressee on a particular date. We may further point out that the presumption mentioned in sec. 114 is not a presumption of law but a presumption of fact, and where, as in this case, the Defendant pledges his oath that the cover was never tendered to him, we cannot treat the presumption of re-

(8) I. L. R. 28 Cal. 118: s. c. 4 C. W. N. 790 (1900).
(32) I. L. R. 15 Cal. 681 (1888).
(34) 16 W. R. 223, 224 (1871).
(35) 4 C. W. N. 572 (1900).
(36) 6 C. W. N. 184 (187) (1901).
(37) 7 C. L. J. 257 (258) (1907).

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gularity of official business as conclusive against him. We have finally the not unimportant fact that the cover was addressed to the Defendant at his gadi or place of business; there is nothing to show that that was his residence within the meaning of sec. 106. We are, consequently, of opinion that the Plaintiffs have failed to prove that the notice was duly served on the Defendant.

The result is that the decree of the Subordinate Judge is confirmed and this appeal dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 413 OF 1912.

D. CHATTERJEE, J.
WALMSLEY, J.
1914,
Heard, 30, June.
Judgment, 20, July.

JANUKI PERSAD JHA & ors., Plaintiffs, Appellants,
v.
BABU LAL JHA and ors., Defendants, Respondents.

Sonthal Parganas Regulation, III of 1872, secs. 11, 14, 25, 25A—Record of-rights, effect of—Suit challenging record, maintainability of—Special limitation—Limitation Act (IX of 1908), sec 29, how far affects Regulation III of 1872—Minors how affected by the Regulation

The Plaintiffs some of whom were minors sued the Defendants for partition of lands held in common but not as joint family property. In the record-of-rights prepared under Reg. III of 1872 the Defendants had been recorded as proprietor and mokararidar *in respect of the lands. The suit was brought after three years from the date of the publication of the record:*

Held—*That the policy of Regulation III of 1872 was to have a complete record-of-rights and interests in land in the Sonthal Parganas and to exclude the jurisdiction of Civil Courts except in certain matters provided for in the Regulation.*

That the suit so far as it regarded the proprietary rights in the land was barred by limitation under sec. 25A of the Regulation.

That the Limitation Act is applicable to the Sonthal Parganas, but sec. 29 of Act IX of 1908 saves all provisions of local laws as to limitation and does not therefore affect the three years' rule under sec. 25A of the Regulation

That the Regulation does not make any exception in favour of minors and the minority provisions of the general Limitation Act has reference to the periods of limitation prescribed in that Act.

That the notice provided by sec. 14 is to the people of the village irrespective of age or intelligence and as the law makes the record-of-rights conclusive proof of the rights and interests therein recorded the Defendants could not be called upon to prove the service of the required notices.

This was an appeal preferred on the 20th November 1912, from a decision of E. A. Guest, Esq., Subordinate Judge of Zilla Sonthal Parganas, dated the 17th June 1912

The material facts will appear from the judgment.

Babus Uma Kali Mukherjee, Mohini Mohan Chatterjee for the Appellants.

Babus Mohendra Nath Roy, Dhirendra Lal Kastgir, Jogesh Chandra Bose, Surendra Nath Ghosal and *Probodh Chandra Dutt* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is a partition suit brought by the

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Plaintiffs against their uncles, Defendants Nos. 1 and 2, and their descendants who are Defendants Nos. 3—10.

Joyram Dutt, the grandfather, died in 1295, leaving three sons Babulal, Surjee and Dinobandhu. These three brothers remained joint up to about 1302, when they separated in mess, and the income of the family properties which remained joint used to be divided in three equal shares. In this state of things Surjee died about 1308 leaving four sons who are the Plaintiffs. Of these, Plaintiffs Nos. 1 and 2 have attained majority and the other Plaintiffs are minors. So far the facts may be taken as established. The Plaintiffs state that on the death of their father the family properties remained in charge of their uncles, Defendants Nos. 1 and 2, who used to pay them small amounts for the bare necessities of life and were therefore liable to render accounts for the period subsequent to the death of their father. Barring the question of accountability which he denies, Defendant No. 2 more or less supports the case of the Plaintiffs. Defendants Nos. 1, 3 and 4 really oppose the suit. They say that property No. 2 being the zamindary interest in 5 as. 4 ps. thereof was acquired by Defendant No. 1 with his own money in the name of his father and the *mokarari* of 10 as. 8 ps. in his own name: that he has been recorded in the settlement records as the proprietor and *mokararidar* and the suit is barred by limitation under Regulation III of 1872 in respect of this property and properties Nos. 5 and 8. They say that Defendant No. 1 had no objection to divide property No. 2 at the time of the partition, but the father of the Plaintiffs and Defendant No. 2 gave up their share and took the whole of property No. 7 instead. They repudiate their accountability and claim contribution to some debts alleged to be due from the family.

The learned Subordinate Judge has held that the suit for properties Nos. 2, 5 and 8 is barred by the provisions of Regulation III of 1872: he has decreed partition of the other properties and dismissed the claim for accounts: he has also made the Plaintiffs liable to pay ⅓rd share in certain debts. It is contended in appeal before us:—

(1) That the Defendants who plead the Regulation in bar of the suit have not proved that the notices required by the Regulation were duly served and cannot therefore invoke the aid of the Regulation:

(2) That the notices required by the Regulation could not even if served affect the minors who could not in law be considered as cognizant of any proceedings taken:

(3) That the Plaintiffs were minors when the record-of-rights was made and the Defendant No. 1 who was then the *karta* of the family was recorded as such *karta* and the Regulation does not bar the present suit:

(4) That the orchard in Mauza Rouga which was added at the instance of the Defendants as joint property should have been included in the decree:

(5) That if Defendants' case as to properties Nos. 2, 5 and 8 was allowed, the share of the Plaintiffs in property No. 7 should have been ½ instead of ⅓rd:

(6) That the Defendants should have been held to be accountable since the death of the Plaintiffs' father:

(7) That the debts incurred after partition should not have been thrown upon the Plaintiffs:

(8) That the expenses of the *sradh* should not have been divided equally in

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the absence of a contract to bear the same in equal shares.

The first three questions raised by the Appellants would have been of great force if it were not for the peculiar provisions of Regulation III of 1872. The policy of this Regulation was to have a complete record-of-rights and interests in land in the Sonthal Parganas and to exclude the jurisdiction of Civil Courts except in certain matters. Sec. 5 lays down that from the date on which the commencement of a settlement is notified to the date on which the settlement is notified as completed no suit will lie in the Civil Court in regard to any land or any interest in or arising out of land, etc. Sec. 14 lays down that a general notice would be given to the people of the village so that all persons interested may bring forward their claim and the Settlement Officer would enquire into, settle and record all rights in or claims to the lands of a village even if no one appears to urge his claim. Sec. 11 is that except as provided in sec. 25A no suit shall lie in any Civil Court regarding any matter decided by any Settlement Court under these rules: but the decisions and orders of the Settlement Courts under these rules regarding the interests and rights above mentioned shall have the force of a decree of Court. Sec. 25 lays down that after the expiry of 6 months from the date of the publication of the record-of-rights of any village, such record shall be conclusive proof of the rights and customs recorded except rights mentioned in sec. 25A, etc., and then sec. 25A says " Where only the rights of zamindars and other proprietors as between themselves are concerned, a suit may unless it is barred by sec. 13 of the Civil Procedure Code be brought in a Court established under the Bengal Civil Courts Act of 1887 to contest the record within three years of the date of the publication of the record-of-rights. But no such suit shall be brought in any Court after the expiration of three years from that date. This being the nature of the restrictions on the jurisdiction of the ordinary Civil Court this suit so far as it is regarding the proprietary rights in property No. 2 is barred by limitation. It is true that the general Limitation Act is applicable to the Sonthal Parganas, but sec. 29, Act IX of 1908, saves all provisions of local laws as to limitation and does not therefore affect the three years' rule under sec. 25A, Regulation III of 1872. This Regulation does not make any exception in favour of minors and the minority provisions of the general Limitation Act have reference to the periods of limitation prescribed in that Act. The Settlement Officer is supposed to investigate all sorts of claims whether preferred to him or not and although it seems to be against all principles of justice and equity that the claims of minors and others who are supposed not to know their interests should be finally settled in their absence and although it is impossible for any man, however intelligent and efficient he may be, to know of all kinds of claims that may be made by all kinds of men, known and unknown, sane and insane, major and minor, the Settlement Officer is required to investigate, decide and record his decisions on such claims and the record is conclusive evidence. There is the law, and we have to administer it as we find it and leave it to the party aggrieved to bring his grievances to the notice of the Local Government which is the only authority that can mend matters.

It has been argued that the record may at best operate as a decree of a Civil Court under sec. 11 of the Regulation and therefore minors who are not parties cannot

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be bound. The analogy, however, must be subject to the restrictions under the Regulation and we have seen that the Regulation makes no exception in favour of minors and the notice is to the people of the village irrespective of age or intelligence. As the law makes the record-of-rights conclusive proof of the rights and interests therein recorded and the record is in evidence in favour of Defendant No. 1 he could hardly be called upon to prove the service of the required notices. In this view of the case the first three grounds fail. The claim for properties Nos. 5 and 8 also fails on the same grounds.

(4) The Defendants pleaded that the orchard in Mauza Rouga had not been included in the claim and the suit was therefore defective and liable to dismissal. This property was accordingly added to the plaint and has been left out of the decree by mistake. This property will be considered as one of the properties to be divided into three equal parts—one part to be allotted to the Plaintiffs.

(5) As the property No. 7 stands in the names of Surjee and Dinobandhu and the *patta* was given to them and as the contending Defendants admit that they have no share in the same, it may be allotted, half to Plaintiffs and half to Dinobandhu.

(6) Admittedly the parties had been dividing the profits of the family properties up to 1308. We do not think it is made out that the Defendants did not go on making over Plaintiffs' share. The Plaintiffs say that they did not get the whole of the income in their share. We do not think that this is established.

(7) Upon the admitted facts the parties are not the members of a joint family and the Defendants are found not to have been managers on behalf of the Plaintiffs. If they paid any joint debts they may sue for contribution. That is a separate cause of action and cannot be decreed as a counter-claim in a suit which is one for partition by metes and bounds of lands held in common, but not as joint family property.

(8) As regards the expenses of the *sradh*, there is no sufficient evidence of a contract by the Plaintiffs to pay one-third share. They paid what they could and in the absence of such a contract the Defendants cannot compel them to pay an equal share with themselves.

Taking into consideration the circumstances of the case and the success and failure of their respective claims, we think that each party should bear his own costs in both Courts. The decree of the Court below is accordingly modified.

Decree modified.

[CIVIL APPELLATE JURISDICTION]
APPEAL FROM ORIGINAL DECREE
No. 272 OF 1910.

MOOKERJEE, J.	MIRZA MOHAMMAD
BEACHCROFT, J.	SHARAFAT BAHADUR
1914,	and another, Defendants,
Heard,	Appellants,
18, June and	v.
7, August.	SHAZADI WAHIDA
Judgment,	SULTAN BEGUM,
19, August.	Plaintiff, Respondent.

Mahomedan Law—Dower, widow's claim or, charge on estate left by husband—Widow in possession of estate, if can obtain a decree for dower without placing Court in possession of assets—Proper procedure, administration suit.

Under the Mahomedan Law, when a widow is in possession of the undistributed property of her deceased husband, and her dower or any part of it is due and unpaid, she is entitled, as against the other heirs of her husband, to retain such possession until her dower debt is paid, provided that her possession was obtained lawfully and without force or fraud.

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The widow in such a case may be required to account for the profits received by her, but she would be entitled to have set off against the sum received by her the income she might have made from her dower money if it had been paid to her immediately on the death of her husband.

The claim for dower is a debt due from the entire estate of the deceased and ranks equally and rateably with the claims of other creditors. Consequently the share taken by the widow by right of inheritance is liable proportionately for the satisfaction of her dower debt in the same way as the shares taken by the other heirs and the liability of each heir is limited to the extent of the assets in his or her hands.

Where the widow has obtained and retained possession of the entire estate she has no cause of action for a money-decree against the other heirs. In such a case, if the widow desires to have the question of her dower settled, the proper course for her to follow is to institute an administration suit, in which the property can be placed in the hands of the Court, the amount of her claim, if disputed, investigated and appropriate directions given for the satisfaction of her claim by sale of the assets or otherwise. In a case in which the widow is in possession of no portion of the estate, she may sue the persons in possession to enforce her claim, obtain a decree for the entire amount and realise the sum due out of the assets in their hands. In a case where the widow is in possession of a portion of the estate and the other heirs have possession of the remainder, she can seek to recover her dower by way of an administration suit, or by a suit against the other heirs provided she offers to surrender possession of the property in her hands. If she adopts the latter alternative the litigation really assumes the character of an administration suit.

This was an appeal from a decision of Babu Hriday Nath Majumdar, Subordinate Judge, Gaya, dated 31st March 1910.

The facts of the case material to this report are set out in the judgment.

Dr. Rash Behary Ghose, Dr. Sarat Chandra Basak, Maulvi Md. Mustafa Khan and *Maulvi Saogat Ali* for the Appellants.

Mr. S. P. Sinha, Mr. Sultan Ahmad and *Babu Chandra Sekhar Prosad Singh* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by two of the Defendants in a suit by a Mahomedan lady, for realization of Rs. 1,25,000 as deferred dower from the assets left by her husband. According to the Plaintiff, she was married on the 27th February 1892, and her dower was at that time fixed at the sum claimed. Her husband died on the 8th February 1909, before any portion of the dower had been paid. The Defendants are relations of the deceased husband of the Plaintiff, his step-brothers and sisters, his nephews and nieces, who, it is said, claim a share in the estate by right of inheritance. The Defendants pleaded that the dower had been fixed at Rs. 35,000 only and had been fully paid up. The parties, it may be stated, are governed by the Shia School of Mahomedan Law. The Subordinate Judge has found that the dower was fixed at Rs. 1,25,000 and that no portion thereof was paid by the husband during his lifetime. The Subordinate Judge has also held that although the Plaintiff is in possession of the assets left by her husband, she is entitled to obtain a decree for the dower debt in full. In this view, he

has given the Plaintiff a decree for Rs. 1,25,000 payable out of the properties left by her husband. On the present appeal, this decree has been assailed on three grounds, namely, *first*, that the evidence does not establish that the dower was fixed at the sum claimed; *secondly*, that if the alleged contract is taken to have been proved, there was no real agreement for the payment of the sum named: and, *thirdly*, that as the Plaintiff is in possession of the major portion, if not the entirety, of the moveables and immoveables left by her husband, she is not entitled to an unqualified decree for the whole sum claimed.

The first ground raises a question of fact, upon which we see no reason to disagree with the Subordinate Judge. The Plaintiff has examined herself, her parents, the servants of her husband, and one of his friends. The Plaintiff is descended on the paternal side, from the Imperial House of Delhi, and, on the maternal side, from the Royal Family of Oudh. Her husband was also similarly connected. It is by no means improbable that among the parties of the social position of the Plaintiff and her husband, the dower would be fixed at a sum which might seem extravagant in the case of persons in an humbler station of life. There is, consequently, no reason to distrust the oral evidence that the dower was fixed at the sum mentioned. There is also no reliable evidence to show that any portion of the dower was paid by the husband during his lifetime. The first ground, therefore, fails.

The second ground raises the question of the reality of the agreement for payment of the dower at such a large sum as Rs. 1 25,000. The argument in substance is that although this sum might have been named as the dower, neither the husband intended nor the wife expected that the dower should actually be paid at that sum. Reference has, in this connection, been made to the decisions of the Judicial Committee in *Mulkah De Alum* v. *Mirza Jehan Kudr* (1), and *Sulemon Kadr* v. *Mehdi Begum* (2). This contention is of no avail, because, before it could prevail, the Appellants must establish that the sum named was so extravagant and beyond the means of the bridegroom to satisfy that the agreement for its payment could not have been intended by either party thereto to be operative and must be deemed merely as security for an adequate provision for the wife. This clearly would involve an enquiry into facts which have not been investigated, because the question now raised was not even so much as suggested at any stage of the trial. Indeed, it is not even mentioned in any of the twenty-four grounds in the Memorandum of Appeal presented to this Court. We have, on the other hand, evidence to show that the husband of the Plaintiff was in affluent circumstances and has left assets, which, according to the Defendants, is worth more than two lacs of rupees. The second contention must accordingly be overruled.

The third ground raises the question of the relief to which the Plaintiff is entitled. The Defendants contended in the Court below that no relief could be awarded to the Plaintiff as she was in possession of a considerable portion, if not the entirety, of the estate left by her husband. The Plaintiff contended, on the other hand, that she was entitled to an unconditional decree for the whole dower irrespective of the question of her possession.

(1) 10 M. I. A. 252 (1865).
(2) L. R. 25 I. A. 15; s. c. I. L. R. 21 Cal 135 (1898).

THE

Calcutta Weekly Notes.

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Contents.

NOTES.

The new Criminal Law Amendment Act.

The Public Safety and Defence Bill was introduced in the Viceroy's Legislative Council at Delhi on the 18th instant and was passed into law the very same day. His Excellency the Viceroy said that the Indian Act follows the outlines of the Defence of the Realm Act, passed in England after the outbreak of the present European War. The text of the Indian Act has not yet been gazetted and we are not in a position to judge of the similarity and divergences between these measures of English and Indian legislation. For the present, we shall content ourselves by saying that His Excellency is hardly accurate in saying that the English Act has been accepted in England without a murmur.

So far as we have been able to follow the opinion of the thoughtful and intellectual section of the English public, it has been decidedly opposed to the measure even in view of a foreign invasion. We reproduce below the comments of our legal contemporary, the English *Law Journal*, in this connection, as also the speeches of Lord Halsbury and Lord Bryce at the passing of the Act through the House of Lords. Then again early in February last a Bill was read by Lord Parmoor (whose name is very familiar to us as Member of the Judicial Committee of the Privy Council) in the House of Lords for the second time, for the amendment of the Defence of the Realm Act. We publish in another column the debate on Lord Parmoor's Bill from the columns of the *Times* as also the leading article of the *Times* on the subject. It will be observed that Lord Parmoor's Bill was withdrawn on an assurance given by Lord Haldane, the Lord Chancellor, on behalf of the Government that His Lordship would introduce a Bill shortly to amend the Defence of the Realm Act. We venture to think therefore that the Government of India might have awaited for their guidance the introduction of the Amending Bill in Parliament before passing this new measure into law. We are here practically free from alien enemies and we are firm in our belief that the Government can put down effectively any attempted breaches of the peace, and that our Courts may be relied on to adequately punish even the gravest crimes known to law, and that both enjoy the unstinted confidence of the people.

We are, therefore, not at all convinced that there was any urgency for the measure. We cannot but accept the views expressed by such eminent lawyers as Lord Parmoor and Lord Loreburn with the apparent support of Lord Halsbury and the present Lord Chief Justice and other eminent lawyers that no advantage is to be gained by the trial of even the gravest crimes known to common law, even at the present critical times, by a *quasi*-Court-martial tribunal. To justify the transference of jurisdiction from the ordinary Courts of the country to a *quasi*-Court-martial tribunal, it must be shown that the state of the country is such that civil tribunals are incompetent to hold trials or dispense justice. The Hon'ble the Home Member says "that they are very slow and that in cases which would go to the Commissioners (under the new Act) it was essential that there was no delay." We fail to appreciate how the so-called delay which always arises out of the attempt on the part of the prosecution to prove a case which is

wanting in satisfactory proof is to be avoided. Whether the persons presiding over a tribunal be Commissioners or Judges, are they expected under the new law to dispense with the proof of an accused person's guilt? If the new law contemplates that this should be done to any extent or degree, the assurance of the Hon'ble the Home Member that "the peaceful and law-abiding citizen need feel no alarm at the introduction of the Bill" becomes quite unmeaning. Laxity in the matter of evidence will surely result in some innocent person or persons being made to pay the penalty for the acts of some resourceful culprits. Lord Parmoor, Lord Loreburn and other eminent English lawyers of the first rank object to the civil population being subjected to such *quasi*-Court-martial tribunal, because they apprehend that the innocent might suffer more than the guilty. As a matter of state-policy also, it is always undesirable to divert the normal current of law and justice from its tranquil channels. It is not merely those who are denied a fair trial who feel aggrieved but also their friends, relations and the public at large do the same to a great extent, whereas when a person is found guilty after a fair trial, no one can possibly make any grievance of it.

The Defence of the Realm Act met with severe criticism at its passing through the House of Lords. It is remarkable that it was opposed irrespective of party considerations by the most eminent lawyers from the opposite camps, amongst whom the opinions of Lord Halsbury, Lord Bryce, Lord Loreburn and Lord Parmoor deserve special mention.

LORD HALSBURY said :—

"I see no necessity for getting rid of the fabric of personal liberty that has been built up for many generations. Although there are things which should not necessarily be insisted upon in time of war, it seems to me that this wholesale sweeping away of them is greatly to be deprecated. I hesitate very much to surrender all the liberties and protections which have been built up, as I say, for many generations, just because at this particular time there are some things that you may wish to do more quickly than at any other time. I quite agree that the jurisdiction which an officer has over his own soldiers is such that we ought not to interfere with it, and, therefore, I should certainly agree to that extent to the giving of this jurisdiction, at the same time reserving the right of any civilian who is not bound by the military oath, to claim the right to be tried by a judge and jury. I believe a judge and jury would be perfectly able to do justice in those cases, and I do not think that the liberty of the subject is so trifling a matter that it can be swept away in a moment, because some of us are in a panic.

LORD BRYCE, the eminent constitutional lawyer, said :—

"I am not aware that there has ever been any precedent for such a proposal. . . . . If it was a case of invasion or of civil war, then, of course, the Courts would not be available; but while the Courts are available, surely some further reason should be given to us than has been given for such an extraordinary departure as this from historic precedent. . . . . I need not say that we are all heartily and entirely with the Government in desiring to give the amplest power for the arrest and detention of offenders, and we all agree that no crime could be worse than this crime of aiding the enemy if committed by a British subject. The only question is, whether the British subject is not entitled, as he always has been in times past, to have the constitutional protection of being tried by a Civil Court when there is a Civil Court there to try him."

CIVILIANS AND COURTS-MARTIAL.

In his classical work on the Law of the Constitution Professor Dicey contrasts the preservation in England of the safeguards for individual liberty, even at times of national emergency, against the establishment of a "state of siege" which regularly accompanies the outbreak of hostilities in Continental countries. He quotes, as a signal instance of this English reliance on the ordinary law of the land, the case of *Wolfe Tone*, the Irish rebel, who was captured when on his way with a French expedition to take part in the invasion of Ireland. He was tried by Court-martial, found guilty, and sentenced to be hanged; but on the day fixed for his execution an application was made to the King's Bench Court at Dublin for a writ of Habeas Corpus, on the ground that he was not a member of the English military forces, and was, therefore, not triable by the military Courts. The application was granted and the trial of Tone was begun again. The historian of our constitution in the future will have to modify the boast that in time of war we leave the safeguards of the citizen against the Executive untouched. Under the Defence of the Realm Act the military authorities have wide powers of exclusive jurisdiction over persons, whether British subjects or aliens, charged, on however slight grounds, of offences against the safety of the country. And a person arrested at their instance cannot, it seems, invoke the

protection of the writ of Habeas Corpus. Some weeks ago the master of an English trawler who had been arrested at sea on suspicion of some nefarious purpose, but was being detained without any definite charge being laid against him, applied in vain for a rule for the issue of the writ. The King's Bench Court held, it could not interfere (*Dove's* case). Doubtless the Latin maxim holds in a time of national struggle: *Salus populi suprema Lex;* yet it seems a pity from the point of view of constitutional tradition that Parliament has so completely abrogated for a time the fundamental principles of our jurisprudence. It has even invested the exceptional military Courts with the power of inflicting the death sentence upon any civilian, and that though Coke declared that for a Court-martial to hang an offender would be murder, and though in fact the Army law has always withheld this extreme power from the exceptional tribunals which try soldiers' offences. The Government has, indeed, undertaken, under pressure of the highest legal authorities of both political parties, to suspend any death sentence passed by a Court-martial till Parliament has had a further opportunity of considering the matter: and in the short sitting of the House of Lords last week, Lord Loreburn succeeded in extracting from the leader of the House a further promise that, as soon as Parliament is sitting in a manner which will enable it to legislate, a Bill will be introduced to enable British subjects to secure a trial before the ordinary Courts of the land when available. Lord Curzon uttered a dissenting note, but there ought to be no opposition to such a measure; and least of all from those who claim to be upholders of the Constitution.—The English *Law Journal*, 16th January 1915.

THE RIGHTS OF CIVILIANS.

LORD PARMOOR gave yesterday some unanswerable reasons in support of his Bill for amending the Defence of the Realm Act and the code of regulations made under it. Indeed, LORD HALDANE, speaking on behalf of the Government, accepted the principle of the measure; all that he did was to suggest qualifications and reservations in giving it effect, and to affirm by way of precaution the unquestionable right of the Executive in certain events to suspend trial by civil Courts of all offenders under the Act. The Bill itself is simple and very limited in scope. There is no question of restricting the powers of the Executive. These are unprecedented times. The lives, property, and liberties of every one are at stake in the present struggle. Every loyal citizen must cheerfully submit to burdens and inconveniences unknown in normal circumstances. Our enemy is unscrupulous, vigilant, and quick to take advantage of every opening given to him by carelessness or inadvertence on our part; and we must act accordingly. All that LORD PARMOOR'S Bill proposes is that civilians charged with offences under the Defence of the Realm Act shall be tried by the ordinary Courts, in conformity with the usual procedure and the constitutional safeguards against injustice. An innovation without a precedent since the Revolution has been made. LORD PARMOOR'S Bill, if passed, would put an end to it, and would restore to all persons not subject to military law their fundamental rights.

The Act and the long list of regulations made under it invest the Executive with large powers, discretionary and punitive, many of them of a kind unknown to the Common or Statute Law. Some of the offences falling within the new legislation or the rules under it might amount to treason or treason-felony. Some of them might be punishable as of the nature of seditious libels; some might be offences under the general powers of the CROWN in time of war, or misdemeanours at Common Law. Others, again, are distinctly novel, though, it may be necessary in these times. The provisions of Regulations 18 and 27, for example, as to information likely to be useful to the enemy, may be required in the present circumstances. They concern specially newspapers, and on their part there will be no complaint merely on the ground of stringency. Throughout the war there has been shown, it will be admitted, an unmistakable desire to do nothing which would be detrimental to the public interests; instances of inadvertence have been almost unknown; and responsible journals will continue to comply with the letter and spirit of the regulations. What case has been made out for exceptional legislation as to the mode of trial? We are all, with good reason, congratulating ourselves on the absence of panic. Why should the only sign of it be found in our legislation? The criminal Courts are open as usual; and if promptitude in bringing offenders to justice is needed—a point properly urged by LORD HALDANE and others—this is compatible with observing fundamental constitutional practices. If breaches of the Defence of the Realm Act

were brought before the Old Bailey or inquired into at assizes, there is no reason to think that juries would fail to do their duty. There have been in our history times of peril when people were grievously divided and verdicts against public enemies were uncertain. All differences of party or sect being now set aside, the country is of one mind, and every offender would be sure to meet with his deserts. The procedure contemplated by Regulation 56 and some other provisions is too much of a German type. They might be in place in Berlin; they are wholly alien to our ways. It may be, as LORD HALDANE urged, that persons who are not British subjects have not the same rights as Englishmen to our constitutional methods of trial; that is a point of detail upon which there may well be difference of opinion, though for our part we should prefer to see no such distinction as he suggests. We do not doubt that military tribunals would do their best to be fair. But some of the inquiries necessary in giving effect to the regulations, particularly that relating to the collecting, communicating, or disseminating of intelligence, must be of a kind for which Courts-martial are unsuitable. Above all countries England has earned praise as one in which the course of justice is unimpaired even in times of strain and stress. We must not lose that good name in a war against militarism and its despotic methods.

It is not unimportant to note that, when the Government measure was before Parliament, it was left to a few peers, not all Liberals, to plead for the maintenance of fundamental constitutional principles. The House of Commons was silent. Not for the first time it has been shown that in a national crisis, when the latter seems to forget popular rights, a Second Chamber remembers and seeks to preserve them.—*The Times*, 5th Feb. 1915.

CIVILIANS AND MARTIAL LAW.

(Debate in the House of Lords on the Defence of the Realm Act, 4th February 1915.)

LORD PARMOOR moved the second reading of a Bill to amend the Defence of the Realm Consolidation Act, 1914, and to restore to civilians their right to be tried in the ordinary criminal Courts The purpose of the Bill, he explained, was to reinstate the principle which found expression 700 years ago in the Great Charter that no man should be tried except by a jury of his peers and in accordance with the well-established rules of law in this country. At the beginning of the great Revolution that principle stood in the forefront of the Petition of Rights, and when the Revolution ended in the exile of James II, it occupied the foremost in the Declaration of Rights. In the Act of last year a principle inconsistent with that to which he referred was sanctioned for the first time by Parliament. He sought to re-establish the principle which found expression in the Army (Annual) Act. The Defence of the Realm Act was not, in the true sense of the term, martial law at all. It extended to civilians provisions which, under the Army Act, were applicable only to the Army. Bearing in mind the decision of Lord Halsbury, he thought that noble and learned Lord would agree that the necessity for martial law would not arise in this country unless there were actual conditions of warfare and the ordinary Courts were not available for criminal procedure.

It had been suggested that to alter the Defence of the Realm Act in any way might impair the power of our military authorities in case of invasion. In his opinion the contrary was the case. If that Act had any effect it was to curtail the large powers which, under conditions of necessity, were always entrusted to military commanders. The only argument which he had heard against the Bill was that adumbrated by Lord Crawford, that it would curtail the drastic remedies which the noble Lord desired in respect of offences by aliens in this country. It appeared to him that the difficulties which had arisen in dealing with the cases of spies had their origin in divided powers and responsibilities, and that it was essential to place the responsibility in regard to military men upon the War Office and in regard to civilians upon the Home Office. Was it not wrong to place upon an officer in the Army functions and duties which, however, important, were not those for which he had been trained?

Were they not using a wrong weapon for the ends they wished to achieve? They all desired that punishment should follow hot upon crime, but none would desire any drastic course which might lead to the conviction of possibly innocent men. Pointing out that 63 regulations had been made under the Defence of the Realm Act, he questioned whether Parliament ought to approve legislation in the shape of regulations constituting or defining crime.

POWERS UNDER THE ORDINARY LAW.

He recognized, of course, that no punishment could be too severe for acts done to assist our enemies, but such crimes—for example, treason, misprision of treason, and treason-felony—could be dealt with under the ordinary law, and the death penalty could be inflicted. He maintained that in the case of crime which might lead to a death sentence they ought not to depart from the established principles of our law. It was ridiculous to suppose that a general Court-martial was in a better position to deal justly with cases of this kind than the ordinary criminal Courts. He reminded the House that not long ago a man who had been a German Consul in one of our East Coast towns was tried for high treason before a Judge and jury, and that after the decision had been given there was an appeal before the Lord Chief Justice and other Judges, who found unanimously that the crime had not been proved. If the trial had been before a general Court-martial they could not be sure that an innocent man might not have suffered the extreme penalty. At a time

like the present, when there was naturally excitement and bias, it was desirable to make sure that in cases like that to which he had referred every reasonable chance would be given to a prisoner to prove his innocence. The more serious the nature of the crime the more necessary was it that a prisoner should have every opportunity given by our ordinary law for proving that he was not guilty. What he wanted was the establishment of a principle. He did not want to haggle about the ways and means in which it should be carried out. He did not know what the noble Lord on the Woolsack (Viscount Haldane) would be able to say on the question, but if, accepting the principle, he said it must be worked out in accordance with the responsibilities of the Government and subject possibly to limitations, of which the Government would know the necessity, then he would propose that they should postpone further discussion of the Bill with the understanding that it would not be necessary to renew it if the Government themselves took the matter in hand. But he must take his stand on this—that above all countries we were praised for our sense of right and our system of justice, and he must withstand any attempt to tamper with the great principle established for centuries that a prisoner was not entitled to be convicted if he could prove his innocence. He moved the second reading of the Bill.

A GOVERNMENT AMENDING BILL.

VISCOUNT HALDANE said the noble and learned Lord had made a speech permeated with the spirit of the Constitution, and he had said much with which he (Viscount Haldane) was in agreement He had asked him whether the Government accepted the broad principle embodied in this Bill subject to such modifications as they thought the circumstances required. If an affirmative answer were given he understood that the noble Lord would move the adjournment of the debate The Government did propose to make propositions which would be embodied in a Bill to be introduced either in their Lordships' House or in the House of Commons. When we became involved in the war the Government felt that the country was fighting for its life, and therefore they introduced, under the Defence of the Realm Act, nothing amounting to the "State of siege" in Continental countries, but exceptional laws which precluded the doing of a good many things which in ordinary times might be done. The Act enabled the death penalty to be inflicted for an infraction of the regulations. There was great value in legislation of this kind at a time of national emergency, and he agreed with Lord Crawford as to the deterrent effect of possessing machinery which could be promptly put into operation against unscrupulous persons who might be alien enemies, and who committed acts against the public safety. But in the present condition of things the law as it had been enacted went further than was really necessary. The deterrent provisions had been of great value, but when they came to the machinery of punishment other considerations came in. He thought it was right that everybody who was subject to military law should be subject to the Defence of the Realm Act. He saw no reason why they should make any exception in favour of persons who did not enjoy the constitutional right of trial by jury by reason of not being British subjects. He thought the Bill of the noble Lord went rather far in that direction.

AMENDMENTS OF MACHINERY.

The first amendment of the machinery by which the noble Lord proposed to work out the principle which he (Lord Haldane) accepted, was that the Bill of the noble Lord should not extend to any one who was not a British subject. If a man committed an offence against the Defence of the Realm Act here were certain cases in which he could only be tried before a Court of summary jurisdiction—a Civil Court—which could only inflict punishment up to six months' imprisonment. He saw no reason why any alteration should be made in that respect. There was another class of offences which were serious, but some of them had not yet been sufficiently defined by our laws. Any amending Bill would have to make it clear that these offences were offences which could not be tried before a civil tribunal.

The necessities of the case as well as the object of Lord Crawford would be met if anybody, being a British subject and not subject to military law, who was about to be tried for an offence which could not come before a Court of summary jurisdiction had the option to be tried by a Civil Court with a jury. He would be glad if that were the case, and he was inclined to think that the punishment inflicted by Civil Courts would be much more severe than that inflicted by Courts-martial, and if a person were being tried for his life he could be tried before a jury in a civil tribunal. There ought, however, to be a provision that if a great national emergency arose, as in the case of a serious invasion, the Executive should have power to suspend that provision, in order that Courts-martial should deal with cases If Lord Parmoor would be content with what he had said he would undertake that within the next few days, either in their Lordships' House or in the other House, a Bill should be submitted which would carry out the principle subject to some such modifications as he had indicated

The MARQUESS of LANSDOWNE concurred in a suggestion made by the Lord Chancellor, that it would be well to postpone the debate until the House had the promised Bill before it. Their Lordships were led to believe in November last the Defence of the Realm Act represented the law as the Government thought it ought to stand in the trying times which were then before the nation. Lord Parmoor's Bill would eviscerate that Act in certain respects. As he understood the Bill, should it become law, no offence committed by civilians would be triable by Courts martial if the accused civilians desired to be tried by Civil Courts. Accused aliens would get the advantage of that relaxation The Bill, therefore, proposed an alteration of the law in essential particulars, and for that reason, if for no other, he thought their Lordships would consider it necessary to scrutinize very narrowly the proposals of Lord Parmoor before assenting to them. On this subject, which was admittedly of the first importance, the Government intended to bring in a Bill to amend their own legislation, and in those circumstances it seemed impossible for their Lordships to commit themselves to Lord Parmoor's Bill

without a knowledge of particulars and facts which they did not possess.

It was clear that emergency measures like the Defence of the Realm Act must involve some interference with privileges to which the country attached the greatest importance and which it venerated and cherished very dearly. But in times like these they must be prepared to part if necessary with some of these privileges, for the public interest required it. He would almost say that they must be prepared rather to risk even an occasional miscarriage of justice than to allow the law or the regulations to remain in an inefficient condition. He could not put the point better than it was put in words used by the Lord Chancellor: "We are living in a state of war and fighting for our lives as a nation, and we have to take exceptional powers" His Majesty's Government had taken such powers and would be supported. If Lord Haldane thought that the Act required revision the Opposition were ready to consider his proposals with a perfectly open mind. One announcement made by the noble and learned Lord appeared to him to be of a very reassuring character. He understood from that announcement that the Government were prepared to declare that at any moment of real emergency even their new provisions might be put on one side and trial by Court-martial might become the rule instead of the exception. That had done much to remove any suspicion from his mind. In the circumstances he hoped Lord Parmoor would be content with the discussion that had taken place and would not ask the House to divide upon his Bill.

THE RIGHTS OF CIVILIANS.

EARL LOREBURN, after stating emphatically that no one wished to embarrass the Government, pointed out that some of the offences provided for by the Defence of the Realm Act and the regulations were new, but that to this exception was not taken When, however, civilians, being British subjects, were charged with offences either under the Act or under the general law, and could be tried by competent Courts of skill and experience, without any resulting inconvenience either to soldiers or sailors or anybody else, they ought, he held, to have the right to trial by the ordinary Courts of the Realm. That was what the supporters of the Bill desired. He thought there was an oversight when the Defence of the Realm measure was brought in at a time of great excitement, for it failed to provide that when the ordinary Courts were sitting they alone ought to try civilians. It was a new thing that any civilian should be liable to be brought before a Court-martial and tried for an offence against the law of his country He did not want noble Lords to be left under the impression that any members of that House or of the public desired to weaken in the least degree the Executive Government. The only demand made was that the ordinary Courts should continue in the discharge of their functions until real necessity for a change should arise Till then civilians in serious cases should be tried by juries and in cases of smaller importance by the Justices. This was especially desirable in view of the nature of the new offences created under the regulations. They were novel and described in general and therefore vague terms. Under the Act it was left to the discretion of the Executive to decide by what kind of Court a civilian should be tried. That he regarded as an undesirable intrusion by the Executive into judicial business and the necessity for it he could not understand.

The EARL OF CRAWFORD protested against the assumption that as the Act stood there were likely to be any number of Courts-martial. Soldiers did not like Courts-martial; it wasted their time; but he thought it necessary that the right to carry them out should be invested in the military. He thought Lord Parmoor was paying more attention to the rights of the individual than the circumstances justified. The deterrent powers of the Courts-martial were of infinite value, and he hoped the Government were not going to weaken the law. He had a great respect for Magna Charta, but the political rights of the individual had got to give way when it was a case of maintaining the existence of our race. He did not mind what political rights were sacrificed if it was shown that it was to strengthen the country against the foe. The agitation in a section of the Press was because the Press thought it might be treated under the Act, but he did not believe the responsible Press of this country suffered the smallest risk of being unduly interfered with. He would like the Government to have the power to use any weapon at their command at this supreme moment, and he warned them that they were proposing to do away with a right, a power, a weapon which was now in their possession. There was a tendency on the part of the Government in certain aspects of certain questions rather to recede from the strong line they at one time took. The position, dangerous as it was six months ago, was still more dangerous to-day, and he did not think it was a time to dispense with any weapon which we possessed

The EARL OF CAMPERDOWN having opposed the Bill,

LORD PARMOOR moved the adjournment of the debate, which was agreed to

CURRENT INDIAN CASES.

(CRIMINAL.)

Sessions trial—Irregularity.

EMPEROR v. NARAIN, I. L. R. 36 All. 481.

In a case tried by jury it was discovered after the first two witnesses for the prosecution were examined that one of the jurors was deaf and had not followed the trial at all. He was discharged and another juror was added. The trial was not commenced anew, but the Judge called up the first two witnesses for the prosecution and had their statements read out to them and they admitted that their evidence which they had heard was correct. The trial then proceeded and other witnesses were examined for the prosecution and for the defence.

Held—That the trial was defective in view of sec. 282, Cr. P. C.

Enhancement of sentence.

EMPEROR *v.* MEHAR CHAND, I. L. R. 36 All. 485.

The Appellate Court affirmed a conviction but altered the sentence of one month's imprisonment and a fine of Rs. 5 to one of three days' imprisonment and a fine of Rs. 100.

Held—That there was no enhancement of sentence it not being shown that the amount of the fine imposed was grossly out of proportion to the means of the accused. In each such case the Court has to consider what is the effect of the alteration.

Criminal Procedure Code, sec. 110—Bad livelihood case—Solitary confinement.

EMPEROR *v.* KUNDAN, I. L. R. 36 All. 495.

Solitary confinement cannot form a part of the imprisonment inflicted in default of furnishing the security called for in a case under sec. 110, Cr. P. C.

Criminal Procedure Code, sec. 421—Judgment, necessity of, when dismissing appeal summarily.

EMPEROR *v.* KUNDAN, I. L. R. 36 All. 496.

A Court of Criminal Appeal is not bound to write a judgment when dismissing an appeal summarily, but it is advisable that it should give reasons for rejecting the appeal in view of the possibility of its order being challenged by an application in revision.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL.—Before THE LORD CHIEF JUSTICE and JUSTICES RIDLEY and SHEARMAN. *The King* v. *Alfred Golathan*. 25th January 1915.

Conviction on an ambiguous plea of guilty set aside.

This was an appeal from a conviction and sentence on a charge of entering a dwelling-house by night with intent to steal. The conviction was based on the prisoner's own plea of guilty, but what the prisoner stated amounted at the most to admitting that he had entered the premises unlawfully without any intention to steal. It was contended on his behalf that that plea ought not to have been taken as a plea of guilty.

The Court quashed the conviction. The Lord Chief Justice said :—

No one ought to be convicted on an ambiguous plea; if a plea had any ambiguity about it it must be taken to be one of not guilty. The conviction and sentence here could not stand, and the result was that the Appellant had never really been tried at all. The Court could not remit a case for retrial, but where there had not been a trial they could order a case to be tried (*Rex* v. *William Baker*, 2 C. A. R. 217). Whether a prisoner had pleaded guilty by mistake was a question which the Court would decide on taking all the facts and circumstances into consideration (*R.* v. *Rhodes*, 11 C. A. R. 33).

As to the present case, they had power to order the Appellant to be kept in custody until trial, but that was a matter for their discretion, and they would not make such an order. The prosecution could go on if they thought right, but the Court, after seeing the depositions, considered that it was doubtful whether on the facts there was any evidence on which the Appellant could be convicted of the offence charged.

Mr. Roland Oliver for the Crown.

Appellant was not represented.

R. D.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.—Before MR. JUSTICE BARGRAVE DEANE. *Slingsby* v. *Slingsby*. 3rd February 1915.

Likeness between the father and son considered in a claim of legitimacy.

This was a petition by an infant, through his guardian, for a decree that he was the lawful child of Mr. and Mrs. Slingsby. The claim was denied by the Defendants. The evidence in the case consisted largely of depositions taken on commission in the United States and Canada, but a peculiar circumstance in the case was the likeness between the claimant and Mr. Slingsby.

The learned President found in favour of the Plaintiff and made the following observations in regard to the likeness between the father and the son :—

The case had lasted for 12 days, and Mr.

and Mrs. Slingsby had been frequently in Court, and more than once the little boy had been with them. On one occasion, when the boy was in Court, he had been struck, as he supposed many other people had been struck, by the extraordinary likeness of the little boy to Mr. Slingsby. Mr. Slingsby had a full round face and a peculiarly shaped jaw, and the little boy was the exact counterpart of him. He had felt so strongly on that point that he mistrusted his own judgment. He had spoken to counsel on both sides, and had suggested that he might have some assessor on that point of likeness—a surgeon or medical man, with knowledge of anatomy.

Counsel had assented to his suggestion, but afterwards he had come to the conclusion that a person accustomed to judging likenesses would be more suitable than a surgeon or a medical man. He informed counsel that he had asked his friend Sir George Frampton, the sculptor, to act as his assessor. Sir George Frampton had come to Court and had seen Mr. and Mrs. Slingsby as they sat in Court with the boy. Sir George Frampton had afterwards pointed out to him (the learned Judge) what he himself had previously noticed—namely, the extraordinary resemblance of the boy to his father.

Sir George Frampton had added that he had noticed, that the boy's left ear was somewhat oddly shaped, and said that he would like to have an opportunity of comparing it with Mrs. Slingsby's ear. He (the learned Judge) had had them all in his room, and Sir George Frampton then pointed out to him a most remarkable resemblance between the boy's left ear and that of his mother. He (the learned Judge) was not founding his judgment on that, but it was a remarkable fact in addition. One might be deceived by mere general likeness, but a child could not acquire the shape of its father's jaw or its mother's ear unless this were congenital. He had looked at the old reports on the question of likeness. In every case, it was necessary to see how the facts in the case shaped themselves, and then to see if the likeness fitted in with them. In his opinion the facts in this case were conclusive.

Messrs. Duke, K. C., Schiller, K. C., and *Hansell* for the Petitioner.

Messrs. Waugh, K. C., T. R. D. Wright and *J. M. Gover* for the Respondents.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN, J. APPEAL FROM APPELLATE DECREES Nos. 1260 TO 1262 OF 1912. CHANDRA MOHAN DAS, Plaintiff, Appellant *v.* SHAIKH HABIL AND OTHERS, Defendants, Respondents. Heard, 16th February. Judgment, 18th February 1915.

Rent, uniform—Presumption—Rent unaltered for a long period—Tenancy created after Permanent Settlement—Bengal Tenancy Act (VIII of 1885), sec. 50.

The Plaintiff was a raiyat under the Defendants who were the landlords. The suit was for a declaration that the rent payable by the Plaintiff was really one-fourth of Rs. 4-14-5 and not Rs. 4-4-5 as recorded in the record-of-rights by the Settlement Officer. The Defendants contended that the suit was not maintainable. The Munsif held that the suit was not maintainable and he therefore dismissed the suit. The Subordinate Judge dismissed the Plaintiff's appeal on the ground that the Plaintiff could not avail himself of the presumption as provided by sec. 50 of the Bengal Tenancy Act, because his holding dated from the date of the *hukumnama* given to him in 1855 which was long after the Permanent Settlement.

Held, that apart from the presumption of sec. 50 of the Bengal Tenancy Act, there was a natural presumption of perpetuity from uniform rent in consequence of the long period during which the rent had never been altered.

Golab Misser v. *Kumar Kalanand Singh* (12 C. L. J. 107) followed.

Babu Khirod Narain Bhuiyan for the Appellant.

Babu Mohini Nath Bose for the Respondents.

A. T. M. *Appeals decreed.*

MIRZA MOHAMMAD SHARAFAT BAHADUR *v.* SHAZADI WAHIDA SULTAN BEGUM.

The argument for the Defendants is based on the theory that as the dower is payable out of the entire estate inherited by all the heirs (of whom the widow is one), she unites in herself the character of debtor and creditor and so long as she is in possession of any portion of the estate, she should not be allowed to hold the assets in the hands of the other heirs responsible for the satisfaction of her entire claim The argument for the Plaintiff is founded on the principle that the fact of her possession does not interfere with her right to sue for dower, for which she has a lien upon each and every fragment of the estate, and that she should be given liberty to proceed against any part thereof, the rights as between herself and the other heirs to be left for adjustment in a separate suit framed for the purpose In our opinion, the extreme contention on each side is open to just criticism It is perfectly true, as pointed out in the cases of *Shahebjan* v *Ansaruddin* (3), *Ali Bakhsh* v *Allahoad* (4), and *Ramzan Ali* v *Ashgari Begam* (5), where the earlier decisions, including those of the Judicial Committee in *Ameeroonissa* v. *Mooradunnessa* (6), *Bebee Bachun* v *Hamid Hossain* (7), and *Bazayed* v *Duli Chand* (8), are reviewed and explained, that under the Mahomedan Law, when a widow is in possession of the undistributed property of her deceased husband, and her dower or any part of it is due and unpaid, she is entitled, as against the other heirs of her husband, to retain such possession until her dower debt is paid, provided that her possession was obtained lawfully and without force or fraud. It was pointed out, however, by Sir Barnes Peacock, C J, in *Ahmed Hossain* v. *Khodeja* (9), that the widow may be required to account for the profits received by her but she would be entitled to have set off against the sum received by her the income she might have made from her dower money if it had been paid to her immediately on the death of her husband [see also *Atahur Ali* v. *Altaf Fatima* (10), *Woomatul Fatima* v *Meerunnessa* (11), and *Hamira Bibi* v *Zubaida Bibi* (12)] It is also clear that the claim for dower is a debt due from the entire estate of the deceased, and ranks equally and rateably with the claims of other creditors: *Mir Mahar Ali* v *Amani* (13), *Imdad Hossein* v *Hossain Bux* (14), *Ameer* v. *Sankara* (15) Consequently, the share taken by the widow by right of inheritance is liable proportionately for the satisfaction of her dower debt in the same way as the shares taken by the other heirs, and the liability of each heir is limited to the extent of the assets in his or her hands It is, consequently, plain that where the widow has obtained and retained possession of the entire estate, she has no cause of action for a money-decree against the other heirs a decree made against them is incapable of execution, as *ex-hypothesi* no portion of the estate sought to be pursued is in their hands In a case of this description, if the widow desires to have the question of her dower settled, the proper course for her to follow is to institute an administration suit, in which the property can be

(3) I. L. R. 38 Cal. 475 (1911)
(4) I L R 32 All. 551 (1910)
(5) I. L R 32 All. 563 (1910)
(6) 6 M. I A. 211 (1855).
(7) 14 M. I. A. 377 (1871).
(8) L. R. 5 I. A. 211; s. c. I L. R 4 Cal. 402 (1878).
(9) 10 W. R 368 (1868)
(10) 10 W R 370 (1868)
(11) 9 W R 318 (1868)
(12) I. L. R 33 All 182 (1910)
(13) 11 W R. 212
(14) 2 All. H. C R. 327, 332 (1869)
(15) I L. R 25 Mad. 658 (1901).

placed in the hands of the Court, the amount of her claim, if disputed, investigated, and appropriate directions given for the satisfaction of her claim by sale of the assets or otherwise. In a case in which the widow is in possession of no portion of the estate, she may sue the persons in possession to enforce her claim, obtain a decree for the entire amount, and realise the sum due out of the assets in their hands. In the case, where the widow is in possession of a portion of the estate and the other heirs have possession of the remainder, she can seek to recover her dower by way of an administration suit, or by a suit against the other heirs, provided she offers to surrender possession of the property in her hands. If she adopts the latter alternative, the litigation really assumes the character of an administration suit. This view is supported by the decision in *Ghulam Ali* v. *Sagirulnessa* (16). We are unable to accept the contention of the Plaintiff that though she is in possession of a considerable portion, if not the whole, of the estate she is not bound to bring into Court the assets in her hands and yet is entitled to an unconditional decree for the entire dower, to be executed against the portion of the estate, if any, in the hands of the Defendants. That this view, if accepted, might lead to grave injustice and multiplicity of suits may be illustrated by a concrete case. A Mahomedan leaves property worth Rs. 10,000. The widow is entitled to Rs. 5,000 for dower. On the death of her husband, she takes possession of moveables worth Rs. 6,000, while the other heirs are in possession of lands worth Rs. 4,000. If the contention of the Plaintiff were to prevail, the widow would be at liberty to sue the other heirs for recovery of Rs. 5,000 on account of dower, to obtain a decree and to sell up the land in their possession to satisfy her claim. They would, then, be driven to sue her for contribution and for the adjustment of their mutual rights and obligations. On the other hand, if she was compelled to place at the disposal of the Court the properties in her hands, the Court might give suitable directions for the sale of such portion of the estate as might be deemed necessary; the balance of the estate would then be divided amongst all the heirs, in proportion to their shares under the Mahomedan Law. In the case before us, the assets consist in part of valuable jewellery, and the parties are at variance upon the question not only of the value, but also of the extent of the assets. In these circumstances, it is essential that the Court should take an account of the properties comprised in the estate before the Plaintiff realises her dues. A further difficulty is created by the circumstance that the parties are Shias, and the Plaintiff is not entitled to share in the whole estate. A childless widow, under the Shia law, takes no share in her husband's land, but she is entitled to her share in the value of the buildings erected thereon as well as in his moveable property. The value of the interest acquired by the Plaintiff in the estate left by her husband cannot, therefore, be determined till an account has been taken of the assets, moveable and immoveable. [Sharaya Ul Islam tr. Querry, Vol. 2, Sec. 242; Baillie, Vol. II, page 295; *Himmat Bahadur* v. *Shahebzadi Begum* (17), *Asloo Umdatunnessa* (18), *Aga Muhammad* v. *Koolsom* (19).] The decree made by the

(16) I. L. R. 23 All. 432 (1901).

(17) 14 W. R. 125.

(18) 20 W. R. 297.

(19) L. R. 24 I. A. 196: s. c. I. L. R. 25 Cal., 9 (1897).

Subordinate Judge cannot consequently be supported.

The result is that this appeal is allowed, the decree of the Subordinate Judge discharged, and the case remanded to him. The decree of this Court will declare that the Plaintiff is entitled to Rs. 1,25,000 on account of her dower, payable out of the estate left by her husband. As she has not claimed interest thereon, no decree for interest will be made; but if the Defendants insist upon an account of the profits received by her from the estate of her husband in her possession, interest will be allowed by way of damages on the dower debt at 12 per cent. per annum from the 8th February 1909 to the date of this suit. Both parties will be required by the Court below to place at its disposal the entire assets, and such directions will be given for the disposal thereof, by sale or otherwise, as may be deemed necessary for the realisation of the sum decreed in favour of the Plaintiff. We are informed that during the pendency of this appeal the decree of the lower Court has been executed by the Plaintiff, and the properties purchased by herself. As the decree of the lower Court is discharged, the sale will stand cancelled. The case will be remitted to the Subordinate Judge in order that the final decree may be drawn up, and steps taken for its realisation as directed by this judgment. If the Defendants insist upon an account of the profits of the estate in the hands of the Plaintiff, the decree will be for the principal sum of Rs. 1,25,000 with interest thereon at 12 per cent. per annum from the 8th February 1909, to the date of suit, reduced by the amount of profits received by the Plaintiff. If the Defendants do not insist upon an account, the profits will be set off against the interest, and the decree will be for Rs. 1,25,000 only. Each party will pay his own costs in this Court; the costs hitherto incurred in the Court below as also the costs incurred after remand will be in the discretion of the Subordinate Judge.

Appeal allowed.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD DUNEDIN.	
LORD SHAW.	DHIRAJ CHANDRA
SIR JOHN EDGE.	BOSE and another,
MR. AMEER ALI.	Appellants,
1914,	*v.*
Heard, 29,	SRIMATI HARI DASI
October.	DEBI and another,
Judgment,	Respondents.
2, November.	

Revenue Sale Law (Act XI of 1859), secs. 5, 18, 33—Estate advertised for sale for arrears of revenue and not for pulbandi charges for which sale ordered under the Certificate Act—Acceptance of arrears of revenue by Collector without formal exemption—Sale for pulbandi dues under same advertisement, illegal—Non issue of notice under sec. 5, if only irregularity.

The Plaintiff who owned a separated share in a revenue-paying estate in arrears applied for exemption from sale of that share upon payment of the arrears; the Collector passed order that the arrears "may be accepted if paid to-day". On that date the Plaintiff was liable to pay Rs. [illegible] for arrears of embankment charges under a certificate issued against Plaintiff and another person after the last day of payment of the revenue in arrear, besides Rs. 870 which was due on account of arrears of revenue. The Plaintiff paid in the latter amount after inquiry made of the Arrear-Collection-moharrir who did not ask for payment of the amount due under the certificate. On the following day the estate was sold under Act XI of 1859, but

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not for the arrears as advertised, but for the amount due for pulbandi. *No notice was issued prior to the sale as required by sec. 5 of the Act (XI of 1859) when an estate is sold for arrears due on account of* pulbandi :

Held, *by the High Court* (HOLMWOOD *and* SHARFUDDIN, JJ.), *that though no formal order of exemption was passed in this case under sec. 18 of Act XI of 1859, and the estate was therefore still liable to sale for the arrears as advertised, it could not be legally sold under Act XI of 1859 for the amount due for* pulbandi *without issue of notice under sec. 5 of Act XI of 1859, and the sale held not being for an arrear of land-revenue was liable to be set aside.*

GOBIND LAL ROY *v.* RAMJANAM MISSER (1), BENARAI LAL *v.* MOHABIR PRASHAD (2) *and* DEONANDAN SINGH *v.* MANBODH SINGH (3), *referred to.*

That when the Collector has acknowledged payment in full of the arrears of land-revenue for which the sale was advertised and has elected to proceed by certificate procedure against an arrear of a different character, and has already directed a sale under that procedure, he cannot treat the arrear under the certificate as an arrear of land-revenue without any notice to the parties under sec. 5 and proceed to sell the property under the land-revenue proclamation on the mere ground that no special exemption order has been passed. The embankment charges ordered to be levied under the Certificate Act are taken out of the purview of Act XI of 1859 unless and until fresh notices are issued under sec. 5, and they cannot be treated as land-revenue.

(1) L. R. 20 I. A. 165 : s. c. I. L. R. 21 Cal 70 1893.
(2) 12 B. L. R. 297 (1873).
(3) I. L. R. 32 Cal 111 (1904).

On appeal, the Judicial Committee saw no reason to interfere with the judgment of the High Court.

This is an appeal from the following judgment of the Calcutta High Court (Holmwood and Sharfuddin, JJ.), dated the 4th July 1910.

"A preliminary objection was taken as to the competency of the Plaintiff to bring this appeal or indeed to sue at all in respect of this estate, on the ground that the estate had passed out of her hands by sale under a mortgage decree.

"This sale in execution, however, was held on the 19th June 1907, and the revenue sale now in dispute was held on the 26th March 1907.

"The decree on the mortgage has, moreover, been impugned in a regular suit, and the matter has been carried to His Majesty in Council. We are asked to postpone the hearing of this appeal until the decision of their Lordships of the Privy Council in the suit to set aside the mortgage decree.

"This we decline to do on the simple ground that there was an interval of nearly three months between the revenue sale and the mortgage sale, and should the Plaintiff succeed in this suit she would be entitled to mesne profits out of the estate from the date of the revenue sale till the date of the mortgage sale, and, therefore, has a subsisting interest in the estate itself and can, therefore, carry on this appeal.

"This is an appeal from the judgment and decree of the Subordinate Judge of Midnapore, dismissing Plaintiff's suit to cancel an alleged revenue sale under the following circumstances :—

"The Plaintiff, a *pardanashin* lady, purchased an eight-anna share of Mahal Gumukpota, No. 941 *tauzi* in the Midnapore Collectorate, at a Civil Court sale on

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the 21st September 1904. The eight-anna share was a separate revenue-paying estate known as separate account No. 1.

"There was an arrear in the *kist* for January 1907, and, on the 25th March 1907, the Plaintiff applied to the Collector, praying for exemption from sale of the said share upon payment of the revenue in arrear (*vide* Ex. 7, 25 P. B.).

"On this the Collector endorsed:— 'May be accepted if paid to-day.'

"The Plaintiff's *karpardaz*, thereupon, went to the Arrear-Collection-mohurrir for information as to the Government demands due which were required to be paid. The information given to him was that Rs. 807 was the total amount due, and this sum was deposited on the same day.

"It appears that a certificate which had been issued against the Plaintiff for Rs. 69-13-9 for arrears of embankment charges (*pulbandi*), was not mentioned to the Plaintiff's agent, and, accordingly, was not paid. On the following day, March 26th, the estate was put up for sale under Act XI of 1859 and not under the certificate, and sold for the nominal price of Rs. 500, the property being valued at Rs. 50,000. The Defendant No. 2 purchased it and subsequently sold it to Defendant No. 1. The Plaintiff's appeals to the Commissioner and to the Board of Revenue were dismissed, and she, therefore, brought this suit.

"We may mention that although the point now in issue, namely, whether the estate could be sold for arrears of *pulbandi* only under Act XI of 1859 without taking the necessary steps under sec. 5 of the Act, was raised in express terms in the appeal to the Commissioner, it does not appear that the point was urged before him, or if it was, he did not consider it necessary to notice it. The question, however, which would arise under sec. 33 of the Act is not material, inasmuch as it is admitted that if this was a sale under the Revenue Sale Law at all, it cannot be set aside.

"The only point which really arises in this case is whether the sale for an arrear of Rs. 69-13-9 for *pulbandi*, which was already the subject of a certificate, the sale under which was fixed for the same day, 26th March, could be held under the Revenue Sale Law in face of the fact that the Collector's ledger-book, the chalans given to the Plaintiff, the *rubokari* of the 24th May 1907 and the order for sale on the account list of arrears of revenue payable all show that the revenue and other charges had been fully paid up, and that nothing remained due but the sum of Rs. 69-13-9 under the certificate 4654. The account list on pages 9—16 of the paper-book clearly refers to the certificate which will be found on p. 36 P. B., and the Collector must have known when he passed the order that the only debt due from the estate was already the subject of a certificate decree, or if he did not, the Plaintiff ought not to suffer for his laches. Now, this certificate was issued not only against the Plaintiff as proprietress but against one Jogendra Nath Pathak, the usufructuary mortgagee in possession, and this is urged as a further ground for holding that the estate could not be sold under Act XI of 1859 as for an arrear of Government revenue. No arrear of Government revenue was or could be due from Jogendra Nath Pathak, yet he was equally liable with the Plaintiff for the *pulbandi* arrear for which the estate was actually sold.

The Subordinate Judge refused to admit the Collector's ledger, as it was tendered at a late stage of the case, but we thought it right to admit it as a public document about which there was no dispute, and the learned Vakil for the Respondents very

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frankly admitted that he could have no objection to its going in, though he asked us at the same time to take in the judgment in appeal of the Commissioner. This we saw no objection to doing and we have already dealt with it above. We may point out that there is evidence that the existence of the arrear of Rs. 69-13-9 may have purposely been withheld from the Plaintiff, for we find certain pencil calculations on the back of Ex. 1, showing that the person who estimated the Plaintiff's dues at Rs. 807-1-1 had Ex. I actually before him and in his hands when he made the calculation. One of the witnesses who knows the mohurrir Probhat Chandra's hand-writing well and who attests it in the entries made in ink in Ex. I, does not venture to deny that the pencil entries are his, but says he cannot make out in whose writing they are. This witness, Utpal Chandra Bhattacharji, Land Revenue Tauzi-mohurrir, says that parties have always made all necessary enquiries from Probhat, and this practice has been going on ever since he joined the department. He significantly asks "From whom but Probhat Babu should parties get these informations as to how much is deposited?" and this rather discounts the value of the Commissioner's judgment which is based on the fact that Plaintiff's agent had no business to rely on casual enquiries from a busy man like the mohurrir Probhat on the day before the sales. Probhat himself gives a very half-hearted denial to the pencil entries, and we must take it that he alone had the opportunity of making them He does not deny that the *karpardaz* came to him for information, but says he does not remember, but he admits that he was the man who the very next day certified to the Collector that Rs 69-13-9 remained unpaid, without drawing any attention to the fact that this sum was due under a certificate for *pulbandi*, although the order-sheet was before him, and he boasts in his evidence that he could not make an incorrect statement under those circumstances. Yet the order-sheet (pp. 9-16) clearly shows the reference number of the certificate on the face of it.

"We fully appreciate the importance of the dictum of their Lordships of the Judicial Committee in the case of *Gobind Lal Roy* v. *Ramjanam Misser* (1), that anything which impairs the security of purchases at revenue sales tends to lower the price of the estates put up for sale, and that the purchaser should not be exposed to the danger of having his sale set aside after a year upon new grounds.

"But the ground taken in this case is not new. It is the ground that has been apparent on the face of the Collectorate proceedings from the beginning, and was taken in the grounds of appeal to the Commissioner. Having regard to the carelessness apparent in this case, with which any and every statement of a mohurrir is accepted by the subordinate revenue officers and passed on to the Collector, and to the immense temptation these mohurrirs are under to traffic in revenue-sales, we think that the evidence of the *bonâ fides* of the mohurrirs should be most carefully scrutinized, and when, as in this case, there appears *primâ facie* suspicion of misrepresentation the technical effect of the Collector's orders should be very strictly interpreted in favour of the Plaintiff.

"There is no direct evidence of an attachment under the certificate for Rs. 69-13-9, but the certificate itself obtained the force of a decree on the 12th March 1907 when it was filed, and the order for sale on 26th March, which was

(1) I. L. R. 20 I. A. 165: s. c. I. L. R. 21 Cal. 70 at p. 83 (1893).

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passed on the same day, is clearly an order for execution of the decree by sale, and operates as an attachment within the meaning of sec. 17, for the words of that section are not 'ordered to be attached' but 'held under attachment by the revenue authorities otherwise than by order of a judicial authority,' but the sale is not bad on that ground alone since the attachment, if any, was made after the last day of payment and after the estate had become liable to sale for arrear of Government revenue: *Bunwari Lal* v. *Mohabir Prashad* (2). But the main ground for holding that the sale must be set aside is that it is not for arrears of revenue at all. Sec. 33 says 'no sale for arrears of revenue shall be annulled by a Court of justice,' it does not say 'no sale purporting to be for arrears of revenue shall be set aside.'

"It is in vain to say that the Collector could have sold the estate for arrears of embankment charges if he had not issued a certificate and had proceeded under sec. 5 of the Act.

"It is urged that the omission to proceed under sec. 5 is a mere irregularity, but their Lordships of the Judicial Committee did not lay this down in *Gobind Lal Roy's* case (1), and the only authority we have been referred to, the case of *Deonandan Singh* v. *Manbodh Singh* (3), merely says that the non-issue of a notice under sec. 5 is an irregularity which does not make a sale a nullity unless the ground has been specified in the appeal to the Commissioner. This case is rather in Plaintiff's favour, and in any case no notice under sec. 5 was held to be necessary in that case, as the arrears were not other than those of the current year and of the year immediately preceding.

"But to say that no notice under sec. 5 is necessary when the sale is not for arrears of revenue at all, but for other demands recoverable by the same process as land-revenue, is going very much farther than any authority with which we are acquainted, more especially when the arrears of *pulbandi* were already under process of recovery by the certificate procedure.

"It is useless to enter into an examination of all the facts and documents referred to by the learned Subordinate Judge. The first five issues which he set himself to try were decided in favour of the Plaintiff. The 10th issue was the most important in the light of the questions as framed, and the principal part of his judgment is upon this, *viz.*, whether there were any arrears of revenue due by the Plaintiff for which the property was sold.

"It is, of course, perfectly clear that the head-note to Ex. 12 which is the certified copy of the Collector's order, Ex. 1, is not part of the document at all. But we have the whole document in original at pages 9-16, and that document shows that the Collector was misled into thinking that the arrear of Rs. 69-13-9 which clearly appears by the reference to the certificate to be an arrear of *pulbandi*, was, as a matter of fact, an arrear of revenue, and on this he ordered an immediate sale on the sale proclamations already issued under sec. 6 of Act XI of 1859.

"The proclamation is to be found on pages 76-77, and shows that the arrear of land revenue was Rs. 547-10-10.

"Now, it is clearly established by the Collectorate ledger exhibited in this Court, by the chalans, Ex. 2 (series), pages 12—16, supplemental paper-book, and by the Collector's *rubokari* on the 24th May 1907 that this Rs. 547-10-10

(1) L. R. 20 I. A. 165: S. C. I. L. R. 21 Cal. 70 (1893).
(2) 12 B. L. R. 297 (1873).
(3) I. L. R. 32 Cal. 111 (1904).

IN THE MATTER OF AKHOY KUMARI DEBI.

B. L. Mitter) appeared for the Respondent Hazari Dasi Debi.

Mr. Norton produced a translation of the alleged Will (which was filed on that day) and contended that the 9th para. of the Will shows by implication that Sarala is a guardian as appointed by the testator and "No express words are necessary to appoint a guardian": Theobald on Wills, 6th Ed., p. 99, *Syad Shahu* v. *Hapija Begam* (1), *Chinnasami* v. *Hariharabadra* (2) and *Pathan Ali Khan Badlu Khan* v. *Bai Panibai* (3).

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—These are two appeals from an order appointing a guardian of a Hindu widow aged 14 There is no power in the Court to appoint a guardian unless the Court is satisfied that it is for the welfare of the minor that the order should be passed. In support of the application there is no affidavit on which the Court can act . . . . As it is, we have the curious position that an order appointing a guardian has been made on materials which do not comply with the requirements of the law and at the same time a Rule has been issued on another application and is pending for the determination of the question whether some one else should not be appointed guardian.

The proper course now to follow is this:—We set aside the order of Mr. Justice Imam and send back the case in order that it may be re-heard by him if the petitioner thinks fit to put in proper evidence in support of her application. .

Finally, we think before making any order the Court must be satisfied that the application is for the welfare of the minor and that the appointment of the guardian will not infringe sub-sec. (3) of sec. 7 of the Act.

In our opinion the Judge had jurisdiction and was bound to consider that there was a Will although probate had not been granted: and that appears to us to be the result of several authorities: *Syad Shahu* v. *Hapija Begam* (1), *Chinnasami* v. *Hariharabadra* (2) and *Pathan Ali Khan Badlu Khan* v. *Bai Panibai* (3). The fact that there is a contest as to the validity of the Will may induce the Court to exercise its discretion one way or the other, as for instance, it may possibly defer deciding on the question of guardianship until the question of probate has been determined. But it is not open to the Court to say that it will refuse to take notice of the Will.

We allow the appeals. The Respondent will pay the costs of the Appellant (*Mr. Norton's* client).

Mr. P. N. Sen and *Mr. M. N. Sen*, Attorneys for the Appellant.

Messrs. Manuel & Agarwalla and *Dè*, Attorneys for the Respondent.

Appeal allowed.

P. D.

(1) I. L. R. 17 Bom. 560 (1892).
(2) I. L. R. 16 Mad. 380 (1893).
(3) I. L. R. 19 Bom. 832 (1894).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 860 OF 1912.

N. R. CHATTERJEA, J. GREAVES, J.
1914,
Heard,
24, November.
Judgment,
16, December.

KRISHNA LAL CHOUDHURI & ors., Appellants,
v.
SALIM MAHAMED CHOUDHURY, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), Sch. III,

(1) I. L. R. 17 Bom. 560 (1892).
(2) I. L. R. 16 Mad. 380 (1893).
(3) I. L. R. 19 Bom. 832 (1894).

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Art. 2, cl. (b), sec. 67—Jalkar lease, dues payable under, if rent within the meaning of Bengal Tenancy Act—Suit for recovery of such money if governed by special limitation—Interest, rate of, upon arrears of such money.

A jalkar does not necessarily imply any right to the soil and a suit for the recovery of money payable under a lease merely conferring a right of fishing and no right to land is governed by the special limitation provided by Sch. III, Art. 2, cl. (b), *of the Bengal Tenancy Act.*

Money reserved in such lease is not rent within the meaning of the Bengal Tenancy Act and interest at the rate of 12½ per cent. as provided in sec. 67 of the Act cannot be allowed in respect of arrears of such money.

This was an appeal preferred on the 20th of April 1912, against the decree of A. Majid, Esq., District Judge of Zilla Rajshahi, dated the 4th of January 1912, affirming the decree of Babu Haridas Bose, Munsif, 1st Court at Malda, dated the 31st of August 1911.

The facts will sufficiently appear from the judgment.

Babus Brojo Lal Chakravarty and *Jogesh Chandra Bose* for the Appellants.

No one for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for recovery of money payable under a registered *kabuliyat* in respect of a *jalkar* for the years 1312 to the Pous instalment of 1317 B. S.

The Courts below have disallowed the claim for the years 1312 and 1313 B. S. on the ground that the claim for those years is barred by the special limitation provided by Sch. III, Art. 2, cl. (*b*), of the Bengal Tenancy Act. If the special limitation does not apply to the suit, the claim for the years 1312 and 1313 would be in time under Art. 116 of the general Limitation Act.

Now sec. 193 of the Bengal Tenancy Act lays down that the provisions of the Act applicable to suits for recovery of arrears of rent, shall, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of any rights of pasturage, forest rights, rights over fisheries and the like. Sec. 184 of the Act provides that the suits specified in Sch. III shall be instituted within the time prescribed in that Schedule, and Sch. III, Art. 2, cl. (*b*), prescribes a period of three years within which a suit for recovery of arrears of rent is to be instituted.

It is contended on behalf of the Appellants that the lease in the present case not merely confers a right over a fishery within the meaning of sec. 193 of the Bengal Tenancy Act, but also creates an interest in land and that as such does not come within the purview of the Bengal Tenancy Act. A *jalkar* does not necessarily imply any right to the soil [see *David* v. *Girish Chandra Guha* (1) and *Radha Mohun Mundul* v. *Neel Madhub Mundul* (2)] and we are of opinion that the lease in the present case does not confer any right to land. It merely gives a right to fish in a *jalkar* belonging to the Plaintiffs' zamindary. The fact that the lessee was not to claim reduction of the *jama* (rent) on the ground of drought or inundation does not necessarily show that any right to the soil was conferred. The name of the *jalkar* [*Mara Nadi* (dried-up river)] and the reference to the fishing period in the lease indicate that the *jalkar* was not full of water at all seasons of the year. The tenant took the risks of inundation and failure of rains and the agreement was that he would not be entitled to claim any reduc-

(1) I. L. R. 9 Cal 183 (1882).
(2) 24 W. R. 200 (1875).

tion on those grounds. Then the stipulations that the lessee would not exceed the boundaries and would be bound to give information to the police and to the lessor if any murder was committed within the boundaries of the *jalkar* are not inconsistent with the lease being a fishery lease, as the zamindar after letting out the *jalkar* would no longer keep any watch over the *jalkar*.

It is contended that cesses cannot be charged on a *jalkar* unconnected with any right to the soil, and the fact that the tenant agreed to pay cesses shows that a right to land was conferred by the lease. But the mere fact that the tenant agreed to pay a charge which he might not be legally compelled to pay, cannot alter the nature of the tenancy. Nor is it by itself sufficient to indicate that any right was created in land.

Reliance is placed on the case of *Mahananda Chakravarti* v. *Mongala Keotani* (3) in which importance was attached to the condition that the lessee was to continue liable for the rent even in case of drought and non-rearing of fish. But in that case, there was a lease of a tank in which fish has to be reared, and which cannot be done if there is a drought. The lease did not specify the rights to be exercised by the lessee in the tank. In the present case the *jalkar* appears to be a river which in the rainy season is full of water and in which fish has not to be reared and the only right conferred on the lessee is the right of catching fish. The question is one of construction, and must depend upon the terms of the particular lease.

Upon a consideration of all the terms of the lease we are of opinion that the lease merely conferred a right of fishing and no right to land was conferred.

(3) I. L. R. 31 Cal. 937 (1904).

That being so, the case comes under sec. 193 of the Bengal Tenancy Act, and the arrears for 1312 and 1313 B. S. have been rightly held by the Courts below to be barred by limitation, under Sch. III, Art. 2. cl. (*b*), of the Bengal Tenancy Act.

The next question is whether the Court below was wrong in allowing interest only at the rate of 12½ per cent. per annum on the arrears instead of at the rate of 2 per cent. per month as stipulated in the *kabuliyat*.

Sec. 67 of the Bengal Tenancy Act no doubt provides that an arrear of rent shall bear interest at the rate of 12½ per cent., but it is contended that money payable in respect of a fishery is not "rent" within the meaning of the Act, as "rent" according to sec. 3, cl. (*5*), of the Act means whatever is payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant.

We think, this contention must prevail. We have found that the lease of the *jalkar* does not create any interest in land. That being so, the money reserved in the *kabuliyat* is not "rent" within the meaning of sec. 67 of the Act. In *Shib Prosad Choudhuri* v. *Vakai Pali* (4), there is an observation that there is nothing in the definition of the word "rent" in the Bengal Tenancy Act which excludes fishery rent. But the attention of the learned Judges apparently was not drawn to the fact that the word "rent" in that section has reference to anything payable for use or occupation of land held by the tenant. If what is payable in respect of any rights over fisheries had been "rent" within the meaning of the Act, sec. 193 would not have laid down that the provisions of the Act applicable to suits for the

(4) I. L. R. 33 Cal. 601 (1906).

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recovery of arrears of "rent" shall, as far as may be, apply to suits for the recovery of *anything payable or deliverable* in respect of fishery rights and in that case sec. 193 would have been wholly unnecessary. A similar view was taken in the case of *Abdulullah Sarkar* v. *Asraf Ali Mondal* (5) where the learned Judges were of opinion that money payable in respect of forest rights is not "rent" within the meaning of sec. 3, cl. (5), of the Act.

The learned Subordinate Judge refers to the second clause of sec. 3, cl. (5), where it is laid down that in sec. 67 (and certain other sections) of the Act, "rent" includes also money recoverable under any enactment for the time being in force as if it was rent. But the word "any enactment" obviously refers to any enactment other than the Bengal Tenancy Act; otherwise sec. 193 would have been included among the other sections mentioned therein. They have reference to cases where the money, though not "rent", is by any enactment recoverable as if it was rent, for instance, cesses under sec. 47 of the Cess Act (Bengal Act IX of 1880) or drainage charges (payable by a tenant to his landlord) under sec. 44 of the Drainage Act (Bengal Act VI of 1880). Sec. 193 of the Bengal Tenancy Act does not make money payable in respect of a fishery recoverable as if it was rent. That section merely lays down that the provisions of the Act applicable to suits for recovery of rent shall apply, as far as may be, to anything payable in respect of fishery rights. We are accordingly of opinion that money payable in respect of a fishery is not "rent" within the meaning of the Act.

Then the question arises whether the provision of sec. 67 of the Act relating to interest on arrears of rent is a provision applicable to suits for recovery of rent. If it is so, the provision would apply to money payable in respect of fishery rights having regard to the provisions of sec. 193 of the Bengal Tenancy Act. But "provisions of the Act applicable to suits" have reference to the procedure laid down in the Act relating to suits, and do not include the provisions of the Act regulating the rights and liabilities of landlords and tenants. The provisions of sec. 67 relating to interest affect the contract between the parties, and the restriction of the liability of tenants to pay interest at the rate of 12½ per cent. per annum is a matter of substantive right, and cannot be called a provision applicable to suits. The Court, it is true, cannot award interest at a rate higher than 12½ per cent., if a suit is brought for recovery of rent, but that is because the Act has restricted the liability of the tenant as to the amount of interest payable.

(5) 7 C. L. J. 152 (1907).

We are accordingly of opinion that the Plaintiff is entitled to interest at the rate stipulated in the *kabuliyat*.

The decree of the lower Appellate Court will be modified accordingly and the parties will be entitled to proportionate costs in all the Courts.

Decree modified.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER

No. 342 OF 1912.

MOOKERJEE, J. BEACHCROFT. J.	AJO KOER and another, Judgment-debtors, Appellants,
1913, Heard, 8, August.	*v.*
1914, Judgment, 4, June.	GOPAK NATH, Decree-holder, Respondent.

Civil Procedure Code (Act V of 1908), sec. 47, Or 21, rr. 58, 60—Decree for money—Execution against representative of judgment-debtor—Objection that property not assets left by judgment-

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debtor, but objector's personal property—Claim whether to be determined under sec. 47 or Or. 21, r. 60.

When X in execution of a decree for money against Y proceeds against Z, as the legal representative of Y, in respect of property in the possession of Z and Z contends that the property belongs to him and never formed part of the estate of Y, the question which arises is whether such property is assets in the hands of Z and is liable to be seized in execution of the decree against Y and one for determination by the executing Court under sec. 47 of the Civil Procedure Code.

Per MOOKERJEE J.—*The Full Bench decision in* PANCHANAN *v.* RABIA BIBI (1) *is in no way affected by the decision of the later Full Bench in* KARTICK CHANDRA GHOSE *v.* ASHUTOSH DHARA (2).

This was an appeal from a decision of D. H. Kingsford, Esq., Judicial Commissioner, Chota Nagpur, dated the 27th May 1912, confirming that of Babu Sarat Chandra Pal, Subordinate Judge, Ranchi, dated 1st September 1911.

The material facts will appear from the judgment.

Babu Karunamoy Bose (for *Babu Khetra Mohun Sen*) for the Appellants.

Babu Susil Madhab Mullick for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the judgment-debtors against an order of the District Judge, by which he has dismissed an appeal against an order of the Subordinate Judge in the matter of execution of a decree for money. The decree had been obtained by the Respondents against one Kripal Narayan Tewari. Before the decree could be executed in full, the judgment-debtor died. The decree-holder thereupon took out execution against his widow Ajo Koer as his legal representative. The widow took objection to the attachment of four of the properties against which the decree-holder sought execution as assets of the original judgment-debtor in her hands; she contended that the properties in question were her own properties and did not form part of the estate of her husband. The Subordinate Judge investigated the matter and overruled the objection on the ground that the disputed properties belonged not to the lady but to her husband. The widow then appealed to the District Judge. A preliminary objection was taken that the appeal was incompetent, because the order was not under sec. 47 of the Code but under r. 61 of Or. XXI. The District Judge gave effect to this contention and dismissed the appeal without determination of the merits of the question in controversy between the parties. On the present appeal, the order of the District Judge has been assailed as based upon an erroneous view of the scope of sec. 47. It is plain that the order under appeal cannot be supported.

In the case of *Panchanan* v. *Rabia Bibi* (1), it was unanimously held by a Full Bench of this Court, that an objection taken by a pesron who has become the representative of the judgment-debtor, in the course of the execution of a decree, to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative, is a matter cognizable only under sec 244 of the Code of Civil Procedure, 1882. This decision is binding upon this Court, and is no way affected by the

(1) I. L. R. 17 Cal. 711 (1890).
(2) I. L. R. 39 Cal 298: s. c. 16 C. W. N. 26 (1911).

(1) I. L. R. 17 Cal. 711 (1890

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decision of the subsequent Full Bench in *Kartick Chandra Ghose* v. *Ashutosh Dhara* (2). That case affirms the proposition that when X in execution of a decree for money against Y personally, attaches properties of which Y alleges that he is in possession, not in his own right but as *shebait* of a deity to whom the property has been dedicated and who is not a party to the suit, the question raised falls, not within sec. 244 but within sec. 278 read with sec. 280 of the Code of 1882. This principle does not contravene the rule laid down in *Panchanan* v. *Rabia Bibi* (1), and has no application to the case before us. When, as here, X, in execution of a decree for money against Y proceeds against Z as the legal representative of Y in respect of property in the possession of Z, and Z contends that the property belongs to him and never formed part of the estate of Y, the question arises whether such property is assets in the hands of Z and is liable to be seized in execution of the decree against Y. Such question is plainly a question relating to execution of the decree obtained by X against Y and arises between the Plaintiff decree-holder X on the one hand and the representative, Z, of the Defendant judgment-debtor Y on the other hand. The question consequently must, under sec. 47, be determined by the Court executing the decree and not by a separate suit. The position is entirely different when X in execution of a decree for money against Y personally, attaches property in the possession of Y which Y alleges he holds not in his own right but as *shebait* of a deity who is not a party to the suit. The question raised is no doubt a question relating to the execution of the decree obtained by X against Y, but does it arise between the parties to the suit? Clearly not. The decree has been made in a suit between X on the one hand and Y in his personal capacity on the other hand. The question in execution arises between X on the one hand and Y in his capacity as trustee of an endowment, on the other hand, Y has a two-fold capacity : in one character, he is a party to the suit; in the other, he is a stranger to the suit The position is precisely what it would have been, if Z had been the *shebait* and had claimed the property as such when attached by X in execution of his decree against Y. It is further plain from an examination of the terms of Or 21, r 60, that while it applies to the class of cases of which *Kartick Chandra Ghose* v *Ashutosh Dhara* (2) may be taken as the type, it cannot by any stretch of language be made to cover the class of cases of which *Panchanan* v. *Rabia Bibi* (1) is the leading example. In the former class of cases, the judgment-debtor objects that he is in possession as trustee and not on his own account within the meaning of Or 21, r 60, in the latter class of cases, the representative of the judgment-debtor objects that the property in his hands is not assets available to the decree-holder The objections in the two classes of cases are obviously of fundamentally different kinds. Reference may in this connection be made to the elaborate judgment of Wilson, J., in *Rajrup Singh* v *Ramgopal Roy* (3), which was approved by the Full Bench in *Panchanan* v. *Rabia Bibi* (1) The view taken by the Full Bench has now been adopted by all the Indian High Courts : *Seth Chand Mal* v. *Durga Dei* (4), *Kali Charan* v *Jewat*

(1) I. L. R. 17 Cal. 711 (1890).

(2) I. L. R. 39 Cal. 298 : s. c. 16 C. W. N 26 (1911).

(1) I. L. R. 17 Cal. 711 (1890).

(2) I. L. R. 39 Cal. 298 : s. c 16 C. W. N 26 (1911).

(3) I. L. R 16 Cal. 1 (1888).

(4) I. L. R. 12 All. 313 F. B.) (1889).

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Dubi (5), *Mureegeya* v. *Hayat Saheb* (6), *Gokulsing* v. *Kisansingh* (7), *Vengapayyan* v. *Karim Panakal* (8). In this view, the objection raised by the widow of the original judgment-debtor, who has been brought on the record as his legal representative and who contends that four of the properties sought to be made liable in execution of the decree against her husband do not constitute assets available to the decree-holder, must be determined under sec. 47 of the Code.

The result is that this appeal is allowed, the order of the District Judge set aside and the case remanded to him in order that the appeal may be heard on the merits. The Appellants are entitled to their costs both here and in the Court of appeal below. We assess the hearing fee in this Court at five gold mohurs.

BEACHCROFT, J.—I agree to the proposed order on the ground that the matter is concluded by the decision of the Full Bench in the case of *Panchanan* v. *Rabia Bibi* (1).

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER
No. 184 OF 1910.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 20,
February.
1914,
Judgment,
5, June.

UPENDRA NATH KALAMURI and another, Objectors, Appellants,
v.
KUSUM KUMARI DASI, Decree-holder, Respondent.

Civil Procedure Code (Act V of 1908), sec. 47, Or. 21, rr. 58, 60—Decree against* sebait *as such—Objection by* sebait *or his successor in office that property attached is objector's secular property—Appeal—Second appeal.

When X, in execution of a decree for money against Y, as sebait *of a deity, attaches and proceeds to sell properties of which Y or his successor in office alleges that he is in possession not as* sebait *of the deity but in his own right, the case does not fall within the scope of sec. 47.*

PANCHANAN *v.* RABIA BIBI (9), *distinguished.*

Per MOOKERJEE, J.—*The case of* PANCHANAN *v.* RABIA BIBI (9) *is an authority only for the proposition that when X, in execution of a decree for money against Y, seeks to proceed against Z as the legal representative of Y who is liable only to the extent of the assets of Y in his hands and a question arises whether a particular property does or does not constitute such assets, it must be determined by the execution Court under sec. 47 of the Code.*

BINDESWARI *v.* LUKPAT NATH (10), UMESHANANDA *v.* MAHENDRA PROSAD (11), CHOUDHURY WAHED ALI *v.* JUMAI (12) *and* ABIDUNNISSA *v.* AMIRUNNISSA (13), *distinguished.*

Per BEACHCROFT, J.—*If the claim of the objector is in his own interest as representative of the judgment debtor, the case will come under sec. 47; if the claim is adverse to his interest as representative, it will not.*

This was an appeal from an order of Babu Probha Chandra Sinha, Subordinate Judge, Midnapore, dated 11th February 1910, confirming that of Babu Lal Behari Chatterjee, Munsif, Midnapore, dated 13th September 1909.

(1) I. L. R. 17 Cal 711 (1890).
(5) I. L. R. 28 All. 51 (1905).
(6) I. L. R. 23 Bom. 237 (242) (1898).
(7) I. L. R. 34 Bom. 546 (1910).
(8) I. L. R. 26 Mad. 501 (1902).
(9) I. L. R. 17 Cal. 711 (1890).
(10) 15 C. W. N. 725 (1910).
(11) 14 C. L. J. 337 (1911).
(12) 11 B. L. R. 149 (1872).
(13) L. R. 4 I. A. 66 : s. c. I. L. R. 2 Cal. 327 (1876).

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The material facts will appear from the judgment.

Mr. S. P. Sinha and *Babu Mohini Mohun Chatterjee* for the Appellants.

Dr. Rash Behari Ghose and *Babu Khetra Mohun Sen* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This appeal is directed against an order by which the Subordinate Judge has confirmed an order of the Court of first instance for execution of a money decree. On the 7th April 1904, the Respondent obtained a decree for money against one Gobardhan Kalamuri, described as the *sebait* of goddesses Lakshmi and Bhagabati. Before the decree could be executed in full the judgment-debtor died. On the 28th July 1909, the decree-holder applied for execution of the decree by the sale of an one-fourth share of 260 bighas of land within certain boundaries. She stated in her petition that the judgment-debtor was dead, that he had left five nephews (sons of different sisters) as also three paternal uncles, that one or more of these persons had succeeded as *sebait* of the endowment, but that as Plaintiff had not been able to ascertain who was the *sebait*, she prayed that execution might proceed after service of notice on all these persons under r. 22 of Or. 21 of the Civil Procedure Code, 1908. Notices were issued accordingly. The nephews of the original judgment-debtor took no notice of the proceedings, but on the 19th August 1909, two of the uncles filed a petition of objection, in which they urged, amongst other things, that the properties sought to be attached had not been dedicated to the goddesses named but were private secular properties of the objector, though under a deed, dated the 29th June 1877, a part of the income of these properties had been directed by the then proprietor to be applied for religious purposes. It transpired at the same time that the other uncle of the judgment-debtor who had not entered appearance, had died on the 10th August; the decree-holder thereupon applied that the two objectors who had appeared might be treated as the representatives of the deceased; this was granted. The Court then proceeded to investigate the objection, and, on the 13th September 1909, came to the conclusion that the properties sought to be attached had been dedicated to the goddesses named; in this view, the Court overruled the objection and directed execution to proceed. The objectors then appealed to the Subordinate Judge. When the appeal came on for hearing, a preliminary objection was taken by the decree-holder Respondent that the appeal was incompetent, as the order could not be deemed to have been made under sec. 47 of the Code. The Subordinate Judge expressed himself in favour of this view, but as he felt doubtful whether the appeal was really incompetent, he considered the case on the merits, and ultimately confirmed the order of the original Court. The objectors have appealed to this Court and have contended, *first*, that the appeal to the Subordinate Judge was competent, and, *secondly*, that he has misunderstood the legal effect of the deed of the 29th June 1877.

To determine whether the appeal to the Subordinate Judge was competent, it is necessary to ascertain whether the order of the primary Court falls within the scope of sec. 47. The answer to the question, whether an order in execution proceedings is within the scope of this section, depends upon its nature and contents. If it decides a question relating to the execution, satisfaction or discharge of the decree, and if the decision has been given between the parties to the suit or their representatives in

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interest, the order of the Court falls within the scope of this section, is a decree within the meaning of sec. 2, and as such is appealable under sec. 96 [*Raghubar* v. *Jadunandan* (1), *Joytara* v. *Prankrishen* (2)]. It cannot be disputed that the order of the original Court decided a question relating to the execution of the decree held by the Respondent, namely, whether the decree could be executed by attachment and sale of the property specified in the application of the decree-holder. But the point remains, whether this question arose between the Plaintiff decree-holder on the one hand, and the Defendant judgment-debtor or his representatives on the other hand. It is plain that if and in so far as there was an endowment, the objectors were the legal representatives of the judgment-debtor within the meaning of that expression as defined in sec. 2, cl. (*11*), of the Code; the original Defendant had been sued in a representative character as the *sebait* of the two goddesses named; the objectors had succeeded to the office of *sebait*, and the estate held by the deceased as *sebait* had devolved on his successors in office. This view is in accord with the elementary rule that when a decree has been passed in a suit against a *sebait* as representing an idol, it is binding on the succeeding *sebait*, provided it has been passed without any fraud or collusion: *Prosunno Kumar* v. *Golab Chand* (3), *Tulsi Das* v. *Bejoy* (4), *Manikka* v. *Bala Gopalakrishna* (5). But when a decree has been passed against a person in his capacity as *sebait*, execution can be taken out only against the properties of the endowment in his hands; for as Subramania Ayyar, J., observed in *Venkatasami* v. *Kuppayea* (6), the private property of an individual cannot be taken in execution of a decree made against him in his capacity as manager or trustee of an endowment just as the property of the endowment cannot be taken in execution when the decree against him is in respect of his personal debt. The two capacities are fundamentally distinct, and the individual constitutes two distinct juristic persons from the two different points of view. In the present case, the decree-holder seeks to proceed against the property on the assumption that the Appellants hold it as part of the endowment of the two idols named. The objectors, on the other hand, assert, in their personal capacity, that this is their private property and is not available to the decree-holder for satisfaction of her decree. That decree is essentially against the *debutter* estate, though, as pointed out by their Lordships of the Judicial Committee in *Jagadindra Nath* v. *Hemanta Kumari* (7), the suit was bound to be brought against the *sebait* as such, because it is only in an ideal sense that an idol, though regarded as a juristic person, can hold property. The true position, consequently, is that the question raised by the objectors calls for decision between the decree-holder who is a party to the suit and two persons who are not, for this purpose, representatives of the original Defendant, as they raise the objections not in their capacity as *sebaits*, but in their private individual capacity. This view is supported by the decision of the Full Bench in *Kartick Chandra* v. *Ashutosh* (8). There it was

(1) 15 C. L. J. 89 (1911).
(2) 13 C. L. J. 257 (1910).
(3) L. R. 2 I. A. 145: s. c. 14 B. L. R. 450; 23 W. R. 253 (1875).
(4) 6 C. W. N. 17 (1901).
(5) I. L. R. 29 Mad. 558 (1906).
(6) 14 M. L. J. 377 (1904).
(7) L. R. 31 I. A. 203: s. c. I. L. R. 32 Cal. 129 (1904).
(8) I. L. R. 39 Cal 298: s. c. 16 C. W. N. 26 (1911).

ruled that when X, in execution of a decree for money against Y, personally attaches and proceeds to sell properties of which Y alleges that he is in possession, not in his own right but as *sebait* of a deity to whom the properties have been dedicated, the case does not fall within sec. 244 of the Code of 1882 or sec. 47 of the Code of 1908. The principle recognised by the Full Bench is that there is a fundamental distinction between a right acquired or liability incurred by Y in a personal capacity, and a claim advanced or defence interposed by the same individual in his capacity as *sebait* of a deity. If this distinction is borne in mind, the inference follows that when X, in execution of a decree for money against Y, as *sebait* of a deity, attaches and proceeds to sell properties of which Y, or his successor in office alleges that he is in possession, not as *sebait* of the deity but in his own right, the case does not fall within the scope of sec. 47. Y, in his character as *sebait*, the only character in which he is a party to the suit, cannot rightly be deemed the same person in his character as a private individual. We may add that the decision of the Full Bench in *Panchanan* v. *Rabia Bibi* (9), on which reliance was placed by the Appellants, is not directly in point and does not assist their contention That case is an authority only for the proposition that when X, in execution of a decree for money against Y, seeks to proceed against Z as the legal representative of Y, who is liable only to the extent of the assets of Y in his hands, and a question arises, whether a particular property does or does not constitute such assets, it must be determined by the execution Court under sec. 47 of the Code. Nor is the contention of the Appellants supported by the cases of *Bindeswari* v. *Lukpat Nath* (10) and *Umeshananda* v. *Mahendra Prosad* (11). The former case shows that where a party has obtained an order in his favour on the footing that the Court was competent to deal with the matter and make the order under sec. 47, he cannot, when the validity of the order is challenged by way of appeal, impugn the appeal as incompetent on the ground that the order could not have been made under sec. 47. The latter case is an authority for the proposition that where a decree has been obtained against a person (who had been really removed from the office of *sebait*), on the erroneous assumption that he is still the *sebait*, and upon application made to execute such decree against his successor in office, an objection is raised that there is no valid decree capable of execution against the properties of the endowment, the question falls within sec. 47, because a question was raised, who was the representative of the judgment-debtor, which could be determined only under cl. (3) of that section. Reference was finally made to the decisions of their Lordships of the Judicial Committee in *Choudhury Wahed Ali* v. *Jumai* (12) and *Abidunnissa* v. *Amirunnissa* (13), neither of which lays down any principle contrary to the view I propose to take. The first case affirms what must now be regarded as incontestable, namely, where a decree against a person in a representative capacity has been properly passed and proceedings have been taken thereunder to obtain execution against him in his representative character, he is a party to the suit with respect

(9) I. L. R. 17 Cal. 711 (1890).

(10) 15 C. W. N. 725 (1910).

(11) 14 C. L. J. 337 (1911).

(12) 11 B. L. R. 149 (1872).

(13) L. R. 4 I. A. 66 : s. c. I. L. R. 2 Cal. 327 (1876).

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to any question which may arise between him and the other parties relating to the execution of the decree. The second case shows that sec. 11 of Act XXIII of 1861 (which with important modifications now stands as sec. 47 of the Code of 1908) was not intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree.

It follows that the order of the original Court was not made under sec. 47 and was not a decree liable to be challenged by way of appeal. It must be taken to have been made under r. 60 of Or. 21, although it may be difficult to make the language of that rule fit in precisely with a case in which the Defendant has been sued in a representative capacity and prefers a claim in his personal capacity. The rule, however, recognises a broad distinction between the representative character and the personal character of the same individual. In this view the appeal to the Subordinate Judge was incompetent, and no opinion need be expressed on the question, whether the objection is well-founded on the merits. The appeal is consequently dismissed with costs. We assess the hearing fee at three gold mohurs.

BEACHCROFT, J.—In this case a very real difficulty is raised by the decisions in the cases of *Panchanan* v. *Rabia Bibi* (9), and *Kartick Chandra Ghose* v. *Ashutosh Dhara* (8). Both are decisions of a Full Bench. In the first of these two cases it was decided that an objection by the re-[presenta]tive of the judgment-debtor in [to t]he effect that the property [was his] own and not held by him [as representa]tive was cognisable only under sec. 244 of Act XIV of 1882 (sec. 47 of the present Code). *Primâ facie* that decision would seem to cover the present case. The Appellant has been brought on the record as the representative of the original judgment-debtor and his claim is that the property is his own and that he does not hold it as *sebait*. In the second of the above cases it was decided that when the objector alleges that he is in possession not in his own right but as *sebait* of a deity to whom the property has been dedicated, the order passed is one under sec. 278 of the old Code (now Or. 21, r. 58). The ground on which the decision proceeded was that while the objector was a party to the suit in one capacity the claim was advanced by him in another, and consequently the question did not arise between the parties to the suit in which the decree was passed and therefore was not one to be determined under sec. 244.

Now if this be taken to be the underlying principle to be applied in cases of this nature, it might also have been applied in the case of *Panchanan* v. *Rabia Bibi* (9), for, while the objector claimed the property as her own in her personal right, she was a party to the suit only because she was the widow of the original judgment-debtor and, therefore, liable to the extent of the assets which had come into her hands.

So far then as the principle was recognised in one case and ignored in the other, the two cases would seem to be in conflict. But the learned Judges who decided the later case distinguished it from the earlier one on the ground that it dealt with the converse question. If that be a real ground of distinction, it might be said that the present case being also the converse to the case of *Kartick Chandra Ghose*

(1) 16 C. L. [illegible]
(2) 13 C. L. J. 2[illegible]
(3) L. R. 2 I. A. 1[illegible]
23 W. R. 258 (1[illegible]
(4) 6 C. W. N. 17[illegible] (1[illegible]
(5) I. L. R. 29 Mad. 5[illegible]
[illegible]al 298 : s. c. 16 C. W. N. 26
[illegible]1 (1890).

(9) I. L. R. 17 Cal. 711 (1890).

v. *Ashutosh Dhara* (8) is not concluded by that decision, but should follow that in *Panchanan* v. *Rabia Bibi* (9). The distinction, however, fails when it is attempted to apply it to the facts of the case before us, for here we again have one person in a dual capacity—a state of things which was the foundation of the decision in *Kartick Chandra Ghose's* case (8).

Can then the two cases be reconciled? One possible view occurs to me; it is this. If the claim of the objector is really in his own interests as representative of the judgment-debtor, the case will come under sec. 244; if the claim is adverse to his interests as representative, it will not. If this be a correct test, it will satisfy the conditions in the case of *Panchanan* v. *Rabia Bibi* (9), for the widow's claim in her personal right was in her interests as representative of the judgment-debtor. It will satisfy the conditions in *Kartick Chandra Ghose's* case (8), for the objector's claim as *sebait* was adverse to his interests as representative of the judgment-debtor. Applied to the present case, it provides a feature distinguishing it from the case of *Panchanan* v. *Rabia Bibi* (9), and a solution in accord with the principle underlying the case of *Kartick Chandra Ghose* v. *Ashutosh Dhara* (8).

I therefore agree in dismissing the appeal.

Appeal dismissed.

(8) I. L R 39 Cal. 298 : s. c. 16 C. W N. 26 (1911).

(9) I. L. R 17 Cal. 711 (1890).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES
NOS. 231 AND 232 OF 1914.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 18 and 19, March.
Judgment, 19, March.

DURGI NIKARINI, Defendant, Appellant,
v.
GOBORDHAN BOSE, Plaintiff, Respondent.

Transfer of Property Act (IV of 1882), secs. 2, cl. (c), 116—Ijaradar *for a term, sub-lease for residential purposes granted by, before 1882—Holding over and acceptance of rent by next such* ijaradar, *effect of—Transfer of Property Act, effect of, on such tenancy—Sec 2, cl. (c), sec 116, conditions necessary or the application of—Notice required to terminate such tenancy.*

The Defendant was brought upon the land as a tenant under a verbal lease before the Transfer of Property Act came into force by an ijaradar *of the land, who held for a limited term which expired after the Transfer of Property Act had come into operation. The tenancy was created for residential purposes. The Defendant continued in occupation of the land and was treated as tenant by the next* ijaradar *who accepted rent from the Defendant. The landlord, the lessor of the* ijaradar, *never accepted rent from her.*

Held *(in a suit for ejectment of the Defendant)—That in order to entitle the Defendant to avail herself of the benefit of cl. (c) of sec. 2 of the Transfer of Property Act it is necessary for her to establish that her right as it exists at present arose out of a legal relation constituted before the Transfer of Property Act came into force; in other words, that the tenancy created by the first* ijaradar *continued in operation even after the termination of the first* ijara.

That the tenancy of the Defendant came to an end when the ijara *during which it*

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was created expired, and the true effect of the acquiescence by the second ijaradar *in the continuance of possession by the Defendant and the acceptance of rent from her was to create in her a new tenancy and the provisions of cl.* (c) *of sec. 2 of the Transfer of Property Act were consequently of no avail to the Defendant.*

That in order to come within the scope of sec. 116, the Defendant, besides proving that she as under-lessee remained in possession of the property after the determination of the ijara *granted to her lessor, had to establish that the lessor or his legal representative accepted rent from her.*

That the expression "legal representative" is not defined in the Transfer of Property Act, but it clearly implies a person who occupies the same position as the lessor and it could not include the second ijaradar *who had transferred to him only a fraction of the interest possessed by the lessor.*

That the land in suit having been leased for a purpose other than agricultural or manufacturing, the tenancy must, even if sec. 116 applied, be deemed, in the absence of an agreement to the contrary, to have been a lease from month to month terminable by fifteen days' notice expiring with the end of a month of the tenancy.

These were appeals, preferred on 2nd February 1914, from the decision of H. Walmsley, Esq., District Judge, 24-Parganas, dated 19th January 1914, confirming that of Babu Purna Chandra Bose, Munsif, Alipore, dated 21st July 1913.

The material facts will appear from the judgment.

Babu Mohini Mohon Chatterjee for the Appellant.

Babu Biraj Mohon Majumdar for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

S. A. 231 of 1914.

This is an appeal by the Defendant in a suit for ejectment after service of notice to quit. The question in controversy is, whether the notice was sufficient in law. The Plaintiff has treated the Defendant as a tenant from month to month, entitled to 15 days' notice to quit. The Defendant contends that she is a tenant from year to year, entitled to six months' notice to quit. The question for determination thus is, what is the true status of the Defendant as tenant.

The land in dispute is comprised in the Bhukailash *Debutter* Estate and has been let out to *ijaradars* for a term ever since the 16th December 1870. The first *ijara* lease expired on the 9th July 1884, and, upon the expiry of the successive *ijaras*, fresh *ijara* leases were granted, so that the present *ijaradar* is the seventh in the series. The Defendant came into occupation under a verbal lease on some date, not ascertained, between 1870 and 1884. It has been assumed for the purposes of the present case that her tenancy commenced before 1882, that is, before the Transfer of Property Act came into operation. In a litigation now pending between the Bhukailash *Debutter* Estate and the present *ijaradar*, a Receiver has been appointed to take possession of the property. The Receiver holds the property for the benefit of the person who may ultimately be determined to be entitled to it and he has commenced this litigation for ejectment of the Defendant after service of notice to quit. No question has been raised as to the authority of the Receiver to maintain the present action, and it may be assumed that the Receiver represents the *ijaradar* if the *ijara* is still in existence; he may, on the other hand, be taken to re-

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present the superior landlord, if the *ijara* has terminated.

As regards the status of the Defendant, we have the fundamental fact that she came into occupation as a tenant before the Transfer of Property Act came into force; and was brought upon the land by an *ijaradar* who himself held for a limited term. Now, it cannot be disputed that when a tenant has been brought on the land by a landlord who is himself a lessee for a limited term of years under the proprietor, *primâ facie* his right would come to an end upon the expiry of the lease of his landlord. This was recognised in the case of *Oomatara Debia* v. *Peena Bibee* (1) and was subsequently confirmed by Sir Richard Couch, C. J., in the case of *Hurish Chandra Roy Chaudhury* v. *Sreekalee Mukherjee* (2). The learned Chief Justice stated that it was familiar law that a lessee could not make an underlease for a longer time than his own lease, though he might sublet the land for as long a time as he had himself, unless there was a restriction either by agreement or by law against subletting; but he could not give a greater interest than he had himself in the land. The same view was adopted in the cases of *Sheo Nandan Roy* v. *Ajoodhya Ray* (3) and *Henderson* v. *Squire* (4). Consequently, when the first *ijara*, during the continuance whereof the land was settled with the Defendant by the *ijaradar*, expired on the 9th July 1884, his interest as a tenant terminated, for it is not contended that the land was agricultural, in which event the principle recognised in the cases of *Atal Chandra Rishi* v. *Lakhi Naran Ghose* (5) and *Madan Mohon Singh* v. *Raj Kishori Kumari* (6) might have been invoked. The tenancy was created for residential purposes, and in the case of a tenancy of this description, as soon as the lease of the *ijaradar* expired, the interest of the sub-lessee also ceased to exist.

It appears, however, that after the termination of the first *ijara*, the Defendant continued in occupation of the land and was treated as a tenant by the next *ijaradar* who accepted rent from her. What, then, was the legal effect of this transaction? The Plaintiff-Respondent maintains the view that a new tenancy was created in favour of the Defendant when the new *ijaradar* obtained his title with effect from the 10th July 1884, and that such new tenancy was affected by the provisions of the Transfer of Property Act then in force. The Appellant has strenuously contended, on the other hand, that the tenancy created before the Transfer of Property Act continued unaffected by the Transfer of Property Act even after the termination of the lease of the *ijaradar*. Reliance has, in this connection, been placed upon the terms of cl. (c) of sec. 2 of the Transfer of Property Act which provides that nothing contained therein shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act came into force or any relief in respect of any such right or liability. But, in order to entitle the Defendant to avail herself of the benefit of this provision of the law, it is necessary for her to establish that her right, as it exists at present, arose out of a legal relation constituted before the Transfer of Property Act came into force; in other words, that the tenancy created by the first *ijaradar* continued in operation even after the termination of the first *ijara*. This,

(1) 2 W. R 155 (1865).
(2) 22 W R. 274 (1874).
(3) I. L. R. 26 Cal. 546 (1899)
(4) L. R. 4 Q. B. 170 (1869)
(5) 10 C. L. J. 55 (1909).
(6) 17 C. L. J 384 (1912).

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indeed, is the proposition broadly formulated and strenuously maintained by the Appellant. Reference has been made particularly to the case of *O'Keefe* v. *Walsh* (7) in support of the contention that if upon the termination of the tenancy of the sub-lessee, he is allowed to continue in occupation for a length of time, although no rent is actually paid, there may be a presumption of tacit renovation of the contract; in other words, that when a tenant continues in occupation after the expiry of his lease and is accepted as a tenant by the new landlord who has succeeded to the interest of his grantor, he is, for all purposes, in the same position as if his original tenancy has continued. This contention is too broadly formulated and is not supported by the authorities. Amongst other cases, reference may be made to the decision of Lord Ellenborough in *Digby* v. *Atkinson* (8). There the tenant held over after the expiration of the term and the Chief Justice ruled that he impliedly held subject to all the covenants in the lease which were applicable to what was described as his new situation. There had been, in that case, an enhancement of rent; but the Chief Justice held that the mere advance of rent made no difference; the advanced rent incorporated the old terms with, what he called, the new contract. A similar view was taken in *Morrogh* v. *Alleyne* (9) where it was ruled that the acceptance of a lessee by the remainder-man would import into the new tenancy a covenant by the lessee to repair. The view that a new tenancy is created in favour of the sub-lessee who continues in occupation after the expiry of the lease of his immediate landlord is also supported by the decision in *Henderson* v. *Squire* (4). It is thus plain, on first principles, that when the *ijara* expired, the tenancy of the Defendant also came to an end, and that the true effect of the acquiescence by the second *ijaradar* in the continuance of his possession and the acceptance of rent from him was to create in him a new tenancy. The provisions of cl. (*c*) of sec. 2 of the Transfer of Property Act are consequently of no avail to the Defendant.

It has been next contended on behalf of the Appellant that if her position be deemed to have been affected by the Transfer of Property Act she is protected by the operation of sec. 116. That section provides that if a lessee or under-lessee of property remains in possession thereof, after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year or from month to month, according to the purpose for which the property is leased, as specified is sec. 106. The Appellant seeks to bring her case within the scope of sec. 116, by proof that she as under-lessee remained in possession of the property after the determination of the lease, that is, the *ijara* granted to her lessor. This may be conceded. But the Appellant has further to establish that the lessor or his legal representative has accepted rent from her. It is conceded that the lessor, that is, the landlord of the *ijaradar* has never accepted rent from her. It has been argued that the second *ijaradar* who accepted rent from her was a legal representative of the lessor. We are not prepared to accept this contention as well-founded. The expression "legal representative" is not defined in

(7) 8 L. R. Ir. 184 (1880).
(8) 4 Campbell 275 (1815).
(9) 7 Ir. Rep. Eq. 487 (1873).

(4) L. R. 4 Q. B. 170 (1869).

THE

The Calcutta Weekly Notes.

Vol. XIX.] MONDAY, MARCH 29, 1915. [No. 19.

Contents.

NOTES.

English and Indian Defence of Realm Act.

Sir Reginald Craddock is reported to have announced before the introduction of the Bill that the Government of India proposed to embody in the Act the safeguards proposed to be embodied in the Bill to amend the Defence of the Realm Act in England. So far as we can gather from the debate in the House of Lords, on the 4th of February last, the Lord Chancellor gave an assurance that the provisions of the Act would not be relaxed against aliens but that the right of British subjects to be tried by a Judge and jury and necessarily the right of appeal would be restored by the Amending Bill. The setting up of a special tribunal for the trial of political or suspected political offences would seem therefore to be somewhat hasty and premature. Even assuming that it is likely to serve some useful purpose in the interest of peace and order at the present time, we fail to see what harm could have resulted from allowing an appeal to the High Courts from the decision of the Commissioners. Such appeals would have served to satisfy the accused as also the public that either justice has been done or injustice remedied. It can never be wise to shake the confidence of the people in the proper administration of justice.

We reproduce below an article from the columns of our English contemporary of the *Law Journal* on the Bill recently introduced in Parliament by the Attorney-General for the amendment of the Defence of the Realm Act pursuant to the pressure of influential public opinion against the principles of the Act. It restores to British subjects, other than those who form a part of His Majesty's military forces, the right of trial by the ordinary civil tribunals with the aid of jury even for offences contemplated under the Defence of the Realm Act. But in the new Bill the Government or rather the executive reserves to itself the right in cases within the contemplation of the Act to transfer the jurisdiction to a Court-martial by means of Proclamation in case of "invasion or other special emergency". Special emergency read with invasion must mean invasion and the like and would include civil commotion. Or in other words, trial by Court-martial may be resorted to under circumstances which would render trial before a civil tribunal an impossibility. But since the term emergency is an expression of wide significance, there is still considerable opposition to the Bill in England. Englishmen of all sections who prize the constitution, within which we must include the civil tribunals, find it hard to reconcile themselves to the provision which gives discretionary powers to the executive to suspend the right of a British subject to be tried by a Judge and jury in any case, so long as the ordinary Courts of law are open and available. The Government has introduced a provision in the Bill that when a civilian is charged with an offence under any of the provisions of the Act it will be competent for him within four days of the charge being communicated to him to exercise his option of being tried by a civil tribunal with the aid of a jury. A similar provision in the corresponding Criminal Law Amendment Act would have been greatly appreciated in India.

With reference to the English Amending Bill it is being suggested that the Proclamation conferring jurisdiction on Court-martial to try British subjects should not be issued without the consent of the head of the judiciary. In England it must be remembered

that the legal advisers of the Crown are not only members of the Bar, but are chosen representatives of the people. The Lord Chancellor in the same way is a member of the Bar and also a member of the Government returned to power by the people. Besides, the Lord Chancellor, who is the head of the judiciary, is in constant and intimate touch with His Majesty's English Judges. All these circumstances make it most unlikely that the executive in England would ever issue any Proclamation ousting the jurisdiction of the civil tribunals without consulting the popular legal advisers of the Crown and the Lord Chancellor and through him His Majesty's Judges. In India, however, none of these safeguards exist. So it is not surely too much for us to ask that the Government of India or at any rate the Local Government should consult the local High Court before setting up any special tribunal of Commissioners in any province or in any local area therein. India does not surely enjoy the privilege of self-government, but it has for long enjoyed that of fair trial before Courts of law founded after the model of British Courts of justice and the right of trial before these Courts, safeguarded by appeals, form certainly one of the fundamental constitutional rights of British subjects in India. In the Amending Bill now before Parliament a British Indian subject will have the same option as any other British subject, when charged under the new Act, to be tried by a civil tribunal with a jury and there can be no harm in incorporating a similar provision in the Indian Act. Then, as for ousting the jurisdiction of civil tribunals, identical safe-guards should also be introduced in India. The English Amending Bill also restores the right of appeal.

The provision in the Indian Act which specifically and somewhat elaborately and none the less sweepingly ousts the appellate and revisional jurisdiction of the High Court in respect of any order, judgment, sentence or anything that may be done by the special tribunal of Commissioners, is the one that is open to most serious objection. If the members of the special tribunal do not care to conform even to the fundamental principles of the law of evidence or the rules of ordinary procedure prescribed for the fair trial of an accused person, he will be absolutely without any protection of the law of the land. The facts disclosed at the recent trial before the Special Tribunal at Calcutta (*Emperor* v. *Nagendra Nath Sen Gupta*) have gone to accentuate this apprehension of the Indian public to a great extent. Unless a Court of Justice is prepared to sift and weigh the evidence with scrupulous care, an innocent person may be made to expiate the sins of those who are guilty. The placing of the new special tribunal of Commissioners under the Appellate and Revisional Jurisdiction of the High Court could not have caused any delay in the trial and would have, on the other hand, served to remove apprehensions in the mind of the Indian public with regard to this new emergency legislation. The case of the ex-German Consul *Ahlers* clearly shows that in times of stress an appeal to a Higher Court cannot be safely dispensed with even when the trial was before a Judge and Jury.

Then again the fact that all preliminary enquiry has been dispensed with under the Act makes it all the more objectionable. Preliminary enquiry before a trial serves the useful purpose of eliminating from it a lot of irrelevant matter and also to crystallize the charges against the accused person. In its absence, a trial may assume the shape and form of a roving commission of enquiry which is neither fair to the accused nor to the Judges holding the trial. The latter's difficulties in determining the guilt or innocence of an accused person under such circumstances are ever so much greater than at a regular trial. The task of the accused to defend himself against a medley of allegations is well nigh an impossibility. Our position is this that should invasion or special emergency arise (of which we do not see the remotest prospect) it will be competent to Government to declare martial law within the affected area at once and no reasonable person would then take any exception to it. But so long as our Law Courts are open and available and are not incompetent to hold trial or make its processes and orders obeyed, we are opposed to their jurisdiction being ousted, supplanted or superseded by any special tribunal administering law according to the rules and orders that may be framed by the executive for its guidance. This, we are of opinion, is a serious interference with the most fundamental and valued constitutional right of His Majesty's British Indian subjects.

CIVILIANS AND COURTS-MARTIAL.

The Bill introduced by the Attorney-General, which received a second reading on Wednesday, goes far towards rectifying the error made in

the Defence of the Realm Consolidation Act, passed without adequate opportunity for discussion in November last, and it meets fairly enough the general demand which has made itself felt for a re-consideration of that measure. Among the protests made at the time none was more emphatic than that of Lord Halsbury, who denied the "necessity for getting rid of the fabric of personal liberty that has been built up for many generations"; while on the Government side of the House, Lord Bryce deprecated "such an extraordinary departure as this from historic precedent", and Lord Weardale denounced it as a "monstrous thing". Not only was the whole status of civilians changed by the enactment [sec. 1, sub-sec. (4)] that any person accused of an offence under the Act might be "proceeded against and dealt with as if he were a person subject to military law and had on active service committed an offence" under the Army Act, but this provision abolished at the same time the common law right of the subject to redress where military or civil authorities during an emergency have acted unreasonably or without probable cause. Militarism was here riding rough-shod over both the constitutional and common law of the realm, and none the less was this the case because the Regulations made under the Act provided that "ordinary civil offences will be dealt with by the civil tribunals in the ordinary course of law". On the contrary, this Regulation rather accentuated the vice of the statute, because it assumed that, while the military authorities were exercising their arbitrary powers against persons charged with offences under the Act, the civil Courts were still able to sit to deal with other offenders. That impugned the basic doctrine proclaimed by Coke: "When the Courts are open, martial law cannot be executed"; and by Hale "The exercise of martial law, whereby any person shall lose his life, or members, or liberty, may not be permitted . . when the King's Courts are open". The principle is recognised by the amending Bill, but we are inclined to think that this "restoration of Magna Charta", as it has been called, can scarcely be regarded as complete so long as it remains within the power of a Department to suspend the right by a mere proclamation of a state of emergency, not expressly limited to occasions when the civil Courts are not open and available. It should at least be an essential condition for the validity of a proclamation suspending the ordinary rights of civilians that such a state of things should be declared to exist, and the suggestion that the consent of the head of the judiciary should first be obtained is well worthy of consideration. —The English *Law Journal*, 27th February 1915.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL.—Before THE LORD CHIEF JUSTICE, and JUSTICES RIDLEY and BANKES. *Rex* v. *Edward Berger*. 18th January 1915.

To convict for receiving stolen goods it must be proved that the goods were under the control of the accused.

This was an appeal from a conviction and sentence on a charge of receiving stolen goods. It was found that two men, Hegdis and Natterson, were seen on a van which contained goods which had been stolen from a house the night before. The men were followed, and the goods were brought to the Appellant's shop. The sacks were unloaded from the van, and thereupon the police entered the shop. When asked by the police, the Appellant stated that he was the occupier of the shop, and that he had let a room therein to Natterson on the day before. On these facts it was contended for the Appellant that his conviction was bad inasmuch as it had not been proved that he was in possession of the stolen goods. The Court quashed the conviction. The Lord Chief Justice said:—

It was a difficult point to say whether that amounted to possession or not, more especially when the true test was considered. The great difficulty which the Court had had to surmount was what was the true test There was a division of opinion in the case of *Reg.* v. *Wiley* (20 L. J., M. C. 4), a case which was argued at first before several Judges, and then adjourned for further argument before more Judges, the result being that by a majority of the Judges the opinion was that the conviction was wrong. The principle was best laid down in the words of Mr. Justice Patteson, where he said on page 9:—

"I do not think it necessary that in order to constitute a man a receiver it is necessary that he should touch the goods, or that under certain circumstances a party having a joint possession with the thieves may not be convicted as a receiver; but, I think, to make a person liable as a receiver the goods must be under his control."

The Court thought that was a correct statement of the law. The Court was of opinion

that in this case there was not a sufficient direction to the jury as to the test in law with regard to possession.

Mr. Raglan Somerset for the Appellant.

Mr. A. S. Comyns Carr for the Crown.

B. D.

KING'S BENCH DIVISION. DIVISIONAL COURT.—Before RIDLEY and ATKIN, JJ. *Newman* v. *Bourne and Hollingsworth.* 4th February 1915.

Negligence must be a breach of duty to take proper care.

This was an action to recover damages for negligence. The Plaintiff had gone to the Defendants' shop, and in order to try some dresses, took off her coat which was fastened by a diamond brooch. When she left the shop she forgot the brooch. Subsequently inquiries were made at the shop, and an assistant said that the brooch had been found and that he had put it on his desk. He then went to fetch it, but could not find it as it had disappeared.

The Plaintiff's case was that the Defendants had not exercised due care in the custody of the brooch, and the County Court took the same view and gave judgment for the Plaintiff.

The appeal was dismissed. Mr. Justice Atkin said :—

Gross negligence had been fully explained by Mr Justice Willes in *Grill* v. *General Iron Screw Collier Company* (L. R., 1, C. P., at p. 612). Varying circumstances in which a man might be placed might import a duty to take varying degrees of care, and omission to take the degree of care appropriate to the circumstances was negligence. Whether it was called gross or not was immaterial; negligence to be negligence at all must be a breach of duty and unless there was a breach of duty to take the proper degree of care there was no negligence. The County Court Judge had said that there would be no responsibility on the owner of a shop if his employee found and took possession of an article lost by a customer on the premises without his employer's knowledge, unless the possession of the employee could be shown to be the possession of the employer. He (Mr. Justice Atkin) felt that in the circumstances of modern business the possession of the employee could hardly fail to be the possession of the employer.

Mr. R. S. Nolan for the Appellants.

Mr. Morle for the Respondent.

B D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before WOODROFFE and RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE No. 1831 OF 1913. RAJANI KANTA MANDAL, Defendant, Appellant *v.* KARTIK MANDAL AND OTHERS, Plaintiffs, Respondents. 11th March 1915.

Eejctment—Lease by some of the co-owners — Bonâ fide *belief.*

One Taripulla was owner of 8 annas and Ochhimaddy of the remaining 8 annas of a *jama* of Rs. 14-8 *mudafat* Kajem Ochhimaddy. Two *khadas* of land appertained to that *jama.* Ochhimaddy's heirs, the *pro formâ* Defendants, were in separate and exclusive possession of one *khada* of land. The litigation out of which the present appeal arose related to the remaining one *khada* land.

The Plaintiffs as lessees of Jenatulla, Jatan Bibi, Payamana Bibi and Chhiru Bibi, four of the descendants of Taripulla, sought to recover *khas* possession of 8 annas 7 gandas of the one *khada* land aforesaid.

The Defendant No. 1 contended *inter alia* that he took lease of the entire one *khada* land from Garisulla, Tasiran Bibi and Kanchan Bibi, the descendants of Taripulla, and was in possession of the same, since the date of the settlement in 1310.

The Courts below passed a decree in favour of the Plaintiffs for *khas* possession in respect of 8 annas 7 gandas share.

Held, that the decision in the case of *Binod Lal Pakrasi* v. *Kalu Pramanik* (I. L. R. 20 Cal. 708) could not be applied to the circumstances of the case unless it were shown that Garisulla and others, Defendants' lessors, were under the *bonâ fide* belief that they represented the 16 annas interest of Taripulla and were in fact in actual possession of the land.

Upendra v. *Pratap* (I. L. R. 31 Cal. 708) referred to.

Dakhayani v. *Mono Raut* (19 C. W. N. distinguished.

Babu Surendra Nath Guha for the Appellant.

Babu Gunada Charan Sen for the Respondents.

A. T. M. *Appeal dismissed.*

the Transfer of Property Act. But it clearly implies a person who occupies the same position as the lessor. Unquestionably, it cannot include the second *ijaradar* who had transferred to him only a fraction of the interest possessed by the lessor. If the legislature had intended to include in the expression "legal representative" an intermediate lessee, the section might have been differently framed, and the expression "lessor or any one claiming under him" might have been appropriately used to express the intention of the legislature. We hold that the Appellant has not established that either the lessor of the *ijaradar* or a legal representative of such lessor has accepted rent from her. Consequently she has not brought her case within the operation of sec. 116.

But even if it had been established that rent had been received from the Defendant by the legal representative of the lessor, the section would not have been of any real assistance to her. The effect of the section is that the lease, that is the lease of the person, from whom rent is accepted (in other words, either a lessee or an under-lessee), is renewed from year to year or from month to month, according to the purpose for which the property is leased as specified in sec. 106. In the case before us, the property had been leased for a purpose other than agricultural or manufacturing; and, consequently, if sec. 116 applied, the tenancy must be regarded as terminable after service of notice for fifteen days. It is not necessary, however, to determine the question of the applicability of sec. 116 or to examine whether the provisions of sec. 107 of the Transfer of Property Act are applicable to cases where a tenant holds over under sec. 116 and a lease is now renewed from year to year by operation of law. We have only to deal with the case on the assumption that sec. 116 has no application. If that section has no application, as we hold it has not, what is the position of the Defendant? A new tenancy was created in her favour on the 9th July 1884. That tenancy was neither for agricultural nor for manufacturing, but for residential, purposes. Consequently, under sec. 106, the lease must be deemed to have been a lease from month to month terminable by fifteen days' notice expiring with the end of a month of the tenancy.

But it has been argued that there was either a contract or a presumption to the contrary within the meaning of sec. 106, inasmuch as the parties must be deemed to have continued the terms of the original tenancy created before the Transfer of Property Act came into operation. There is clearly no force in either branch of this contention. It is not contended that there was any express contract to the contrary within the meaning of sec. 106. It has been contended, however, that as laid down in *Motilal* v. *Darjeeling Municipality* (10), the contract to the contrary need not be express, and, that in this case there was an implied agreement to the contrary because the rent had been claimed annually, in other words, the argument is that whenever rent is claimed annually, the presumption is that the tenancy is from year to year. It may possibly be accepted as a proposition generally true that, as indicated in *Wilkinson* v. *Hall* (11), the mode in which rent is expressed to be reserved affords a presumption that the tenancy is of a character corresponding thereto. The rule, however, is not of universal application, and, it was pointed out by Mr. Justice Maule in *Atherstone* v. *Bostock* (12) that the presumption of

(10) 17 C. L. J. 167 (1912)
(11) 3 Bing. N. C. 508 (1837).
(12) 10 L. J. C. P. 115 (1841).

DURGI NIKARINI *v.* GOBORDHAN BOSE.

yearly taking from the rent being paid yearly does not apply to the case of lodgings; and the same view is supported by the case of *Wilson* v. *Abbott* (13). In the case before us, the Defendant has not produced the rent receipts; her plea is that they have been burnt, and there is thus no evidence to show that there was an actual agreement that the rent, under the new contract, should be paid annually. There is also no evidence to show that there was an implied agreement that the new tenancy should be from year to year. Indeed, no rent has ever been paid to the present *ijaradar*, who has sued to recover rent on the footing that it was payable monthly.

No assistance is derived by the Defendant from the decision in *Kelley* v. *Patterson* (14) upon which much stress was placed. In that case, the question for decision was stated by Lord Coleridge in these terms: "Is it a true proposition of law to say that wherever one is in possession of land or premises as tenant and his tenancy comes to an end, either by afflux of time or by the death or end of title of his lessor, so that either his own lessor or the representative of his lessor or any independent owner of the property can without notice eject him and the person entitled to eject him does not do so, but receives rent from him without explanation or stipulation, the person so receiving rent is to be assumed to have adopted the person so in possession as his tenant upon the terms on which that man held in the demise originally made to him?" After this statement of the question for decision, the Chief Justice pointed out that the difficulty of affirming the proposition as a general one is that in some cases the owner is assumed to assent to the terms of a contract of which neither he nor any one through whom he claims or for whom he is responsible has had any knowledge. The difficulty of negativing the proposition is that the owner does adopt the person in possession as his tenant; and, if it is not to be assumed that he adopts him as tenant on the terms on which he held, there seem to be no other terms on which he can have adopted him. This is of no assistance to the Appellant for two reasons. In the first place, the Chief Justice had to consider the question of the terms upon which the tenant was accepted as such after the expiration of the tenancy. In the second place, there is no real difficulty in the case before us, where there is a statutory provision under sec. 106, that the tenancy is to be deemed to be of a particular description, namely, if, as here, it is a tenancy for residential purpose, it is to be deemed a tenancy from month to month, whereas if it is a tenancy for agricultural or manufacturing purposes, it is to be deemed a tenancy from year to year. There is thus no possible escape from the conclusion that the Defendant is a tenant from month to month, that her tenancy was liable to be terminated by 15 days' notice to quit, and that it has been so terminated by a legally sufficient notice.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

It is conceded that this judgment will govern the other appeal (S. A. No. 232 of 1914) which is also dismissed with costs.

Appeal dismissed.

(13) 3 B. and C. 88 (1824).

(14) L. R. 9 C. P. 681 (1874).

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Mr. R. S. Nolan
Mr. Morle for the
B. D.

[PRIVY COUNCIL.]

[APPEAL FROM BENGAL.]

LORD MOULTON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
23, April

NALINI KANTA LAHIRI, since deceased (now represented by SARAT KAMINI DEBI) and another, Appellants,
v.
*SARNAMOYI DEBYA and ors., Respondents.

Res judic ta—*Partition suit—Plaintiff's share declared and separated by metes and bounds—No proceeding by the Defendant to correct errors if any in the apportionment—Subsequent suit by the Defendant to correct error if lies—Mistake, suit to set aside decree on ground of, if lies.*

If any co-sharer applies for a partition of property, he must make the other co-sharers Defendants, because the partition which is made in his favour is a partition against his co-sharers. That which gives him a portion of the property takes away all right which they would otherwise have to that portion, and therefore it is a decree against them and in favour of himself.

Where a decree having been made in a suit for partition declaring the shares of the Plaintiffs, a Commissioner under the Court's direction went and on the ground measured out the declared shares and the Plaintiffs were put into possession thereof, but the Defendants took no proceeding in the suit such as is provided for in the Code of Civil Procedure to correct errors, if any, made in partitioning out:

Held—*That, apart from such proceedings none of which were taken, the decree was* res judicata, *and a suit instituted by the Defendants in the previous suit with a view to correct the apportionment made in favour of the Plaintiffs in the previous suit was barred by* res judicata.

This was an appeal from a judgment and decree, dated the 3rd July 1906, of the High Court of Judicature at Fort William in Bengal which affirmed a judgment and decree of the Court of the Subordinate Judge of Pubna, dated the 22nd September 1902.

The main questions for determination on the present appeal were, *firstly,* whether the Plaintiffs' suit was barred by *res judicata*, and, *secondly*, by limitation.

The litigation related to a *putni taluk* called Taraf Udoi Krishnapur situate in the District of Pubna in Bengal. It belonged to the descendants of one Kali Charan Sanyal, and was jointly possessed and enjoyed by the various co-sharers to the extent of their respective shares. Suits for partition by divers members were instituted from time to time and the lands were divided by metes and bounds by decrees of Court. It is unnecessary to state all the said suits and proceedings in any detail; only those material for the present appeal need be mentioned. They are:—

(1) *Suit No. 5 of 1886.*—Naba Durga Debi and others *v.* Kashi Das Sanyal and others.

(2) *Suit No. 231 of 1892.*—Jadunath Mazumdar and others *v.* Kashi Das Sanyal and others.

The first (No. 5 of 1886) was decided along with two other suits for partition on the 21st September 1886. The issue tried therein was:—What is the extent of share of each co-sharer?

The Court finally decreed the shares of the claimants and that decree became final, and in due course the lands were partitioned off and the aforesaid persons were put in actual possession of their shares.

In the second suit (No. 231 of 1892) Sarnamoyi Debi (Respondent No. 1) applied to be made a Defendant to the suit. She claimed partition of her share. The present Plaintiff urged that he did not receive any notice of Sarnamoyi's application or claims. The Court allowed her claim and a decree, dated the 7th April 1893, was accordingly passed in her favour,

NALINI KANTA LAHIRI *v.* SARNAMOYI DEBYA.

and she was in due course put in possession thereof.

As the result of the several suits and proceedings the whole of the said *putni taluk* was partitioned off among the co-sharers, and the residue left was the share of the said Kashi Das Sanyal who alleged that his proper share was 1 anna 10 gandas; and complained that the other co-sharers received through the Courts more than what they were really entitled to. He therefore instituted the present suit in the Court of the Subordinate Judge of Pubna, on the 15th July 1901, to recover the deficiency from certain Defendants. The Plaintiffs did not allege that the said decrees and proceedings in the partition suits were vitiated by any fraud or collusion.

The said Subordinate Judge delivered his judgment on the 22nd September 1902. He decided that the suit was barred by *res judicata* as well as by limitation, and accordingly made a decree dismissing the suit with costs.

The Plaintiffs thereupon appealed against the said decree to the High Court. The learned Judges (Sir Chunder Madhab Ghose and Caspersz, JJ.) delivered their judgment on the 3rd July 1906. They agreed with the conclusions of the Subordinate Judge, and said as follows :—

"It has been contended by the learned Vakil for the Appellants that, inasmuch as the Plaintiffs and Sarnamoyi were but co-Defendants in the previous suits and were not arrayed against each other as Plaintiffs and Defendants, the judgments passed in the previous suits do not operate as *res judicata*. But we are unable to accept this contention as correct. A decree for partition, as it was held in the case of *Sheikh Khoorshed Hossein* v. *Numbee Fatima* (1), 'is not like a decree for money or delivery of specific property which is only in favour of the Plaintiff in the suit but it is a joint declaration of the rights of persons interested in the property of which partition is sought and such a decree, when properly drawn up, is in favour of each share-holder or set of share-holders, having a distinct share.' There can be no question that, in the previous suit No. 231 of 1892 a decree was drawn up defining the share of Sarnamoyi, and in suit No. 5 of 1886, the share of Naba Durga, Sasi Mukhi and Mukhoda was similarly determined. These two sets of share-holders were duly put in possession of their respective shares by partition and they have since remained in such possession for several years together. The learned Vakil for the Appellants, however, contends that, inasmuch as in those previous suits the share of Kashi Das was acknowledged to be 1 anna 10 gandas, the decrees passed apparently proceeded upon a mistake and, therefore, a suit would properly lie in order to have such mistake rectified. We are of opinion that such a contention cannot prevail. In support, however, of his argument, the learned Vakil has relied upon the case of *Jogeswar Atha* v. *Ganga Bishnu Ghattack* (2); but upon an examination of that case, it will be found that the facts upon which that judgment was pronounced were materially different from those with which we are concerned. This case as also the previous cases bearing upon this matter were considered in a later case which has not been reported [*Chand Mia* v. *Asima Banu* (3)], where it was held that a suit like this could not be sustained unless the decree previously passed was obtained by fraud or otherwise. One of the cases referred

(1) I. L. R. 3 Cal. 551 (1878).

(2) 8 C. W. N. 478 (1904).

(3) S. A. 686 of 1904.

to in this unreported case is the case of *Sadho Miser* v. *Golab Singh* (4), in which it was held that the only ways in which a decree can be set aside by a party thereto are by appeal, by proceedings under sec. 108, C. C. P., and similar other sections, and by application for review, and that, if the decree was not tainted with fraud, no suit would lie to set it aside. In the present case, there is no allegation that there was any fraud in the matter of the decrees that were pronounced in the previous suits; and the Subordinate Judge states, in one portion of his judgment, that it is not the Plaintiffs' case that they were not aware of the previous partition suits or that they were not served with summonses in those cases. If that is so, we fail to understand upon what grounds the Plaintiffs can be allowed to go behind the decrees that were passed in the previous partition suits. We may, however, add that, if the Plaintiffs in those suits or any one of the other share-holders, Dinendra or his wife Sarnamoyi inclusive, were put in possession of any extra share contrary to the directions in the decrees, the proper course for the Plaintiffs to follow would have been to present an application under sec. 244 of the Code of Civil Procedure and to have the whole matter settled in the course of the execution proceedings. But they did not choose to adopt that course and, as already mentioned, they allowed the Defendants against whom they have brought the present action to remain in possession of the respective shares allotted to them by partition for over six years. It is apparent that the Plaintiffs cannot obtain any relief unless and until those decrees are set aside. A decree passed by a Court may be set aside within three years under the Limitation Act if the decree was obtained by fraud. But in other cases (supposing a suit lies to set aside the decree), the period of limitation would be six years as provided by Art. 120 of the Indian Limitation Act. And this suit having been brought more than six years after the date when the Defendants were put in possession of the extra share, it is clearly barred by limitation."

Mr. L. DeGruyther, K. C., and *Mr. G. E. I. Ross, K. C.*, for the Appellants, submitted that the suit was not barred by the principle of *res judicata*. The Plaintiff's share was never denied in the partition suits and no decision was given therein which could affect the Plaintiff adversely. The Plaintiff was a Defendant in form only. Further, the decree in suit No. 231 of 1892 was a nullity and had no effect against the Plaintiff. He never had notice of Sarnamoyi's application or claim. Sec. 108 of the Code of Civil Procedure applied to those suits only where the notice of the plaint was served upon the Defendant. Here Sarnamoyi obtained a decree for lands in excess of her real share behind the Plaintiff's back.

Mr. Bhugwandin Dubé, Counsel for the Respondents, was not heard.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MOULTON.—In this case the original Plaintiff (now represented by the Appellants) was one of the co-sharers of a *putni taluk*. In past times, others of the co-sharers have been desirous to have their shares partitioned out to them, and have accordingly brought suits for that purpose. To every one of those numerous suits the Appellant was a party, and the object of each of those suits was to have the share of the Plaintiff in the suit partitioned out by metes and bounds.

(4) 3 C. W. N 375 (1897).

NALINI KANTA LAHIRI *v.* SARNAMOYI DEBYA.

Those suits have gone on until every co-sharer other than the Plaintiff has had his share thus partitioned out, so that the Plaintiff was left with the remainder as representing his share. In this suit he alleged that this remainder was insufficient to represent his share of the original *putni taluk*. It is evident that on examination of the claims of previous Plaintiffs, he had convinced himself, and, so far as their Lordships know, convinced himself correctly, that in two cases the shares ascribed to other co-sharers were larger than those to which they were entitled, and that, accordingly, the partition gave them a larger share of the property than it ought to have done.

It is immaterial, in the opinion of their Lordships, whether this view which is put forward by the Plaintiff in his plaint is correct or not, but their Lordships will assume for the purpose of this judgment that it is correct. The object of the present suit is to correct the apportionment to those of the previous Plaintiffs, or co-sharers, who received more than their proper share so that the remainder will properly represent the Plaintiff's share.

The Courts below have held that this suit cannot be sustained both on the ground of *res judicata* and on the ground of limitation. Their Lordships do not find it necessary to deal with the question of limitation, which was dealt with by both the Courts below, because they are of opinion that the plea of *res judicata* is a sufficient answer to the suit.

The case viewed from this point of view is an extremely simple one. If any co-sharer applies for a partition of a property he must make the other co-sharers Defendants, because the partition which is made in his favour is a partition against his co-sharers. That which gives him a portion of the property takes away all right which they would otherwise have to that portion, and therefore it is a decree against them, and in favour of himself.

In the present case two groups of suits are referred to. The first comprises suits 25 of 1885, and 75 of 1885, and suit 5 of 1886. These suits were heard together, and culminated in a decree which was a decree made in the three suits. It declared the shares of all those who in those suits sought partition. The Commissioner was directed to go and on the ground to measure out the declared shares of those parties. That was done, and they were put into possession of those shares.

The decree was thus made in a partition suit in which the Plaintiff was a Defendant. It was therefore a decree against him in a suit to which he was a party. That being so, their Lordships have no hesitation in saying that it became thereby *res judicata*, so far as he was concerned. Supposing any error was made in the partitioning out, his remedy lay in proceedings in that suit suitable to correct that error; and the Code of Civil Procedure provides adequate means for the correction of such errors. But apart from such proceedings (none of which were taken by him) it is in their Lordships' opinion the clearest possible example of *res judicata*, a judicial decree made against a party in a suit in which he is Defendant.

Mr. Ross has attempted to draw a distinction between the partitions under this group of suits and that in the other suit to which exception is taken by the Plaintiff, *viz.*, No. 231 of 1892. In that case a lady, who was not originally made a Defendant, applied to be made a Defendant, claiming that a certain portion of the share of her husband (who was a Defendant to the action) was now possessed by her, and she was accordingly made a Defendant. In such partition suits a Defendant has a right



to have his share also partitioned out, and she applied and had her share partitioned out. Mr. Ross has been unable to point out any irregularity in the procedure in that suit. He points out, with perfect justice, that in the plaint his client says that he was ignorant of her being made a party, and intimates that he was ignorant also of her having obtained a partition. But he admits that his client must have known of the decree for partition, and certainly he knew that he was interested in the partitioning actually being carried out in that suit. But it is not necessary to enter into these matters. It suffices for the present judgment to say that no irregularity of any kind has been pointed out by the Counsel for the Appellants in that suit, and the consequence is that there is nothing to distinguish it from the previous cases with which their Lordships have already dealt.

Their Lordships are therefore of opinion that the action of the Plaintiff is barred by the plea of *res judicata*, and accordingly they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors: *Messrs. W. W. Box & Co.* for the Appellants.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Respondents.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3356 OF 1910.

HARINGTON, J.
CARNDUFF, J.
1913,
19, March.

NATHAN SAO, Defendant, Appellant,
v.
MRS. ANNIE BESANT, Plaintiff, Respondent.

Mortgage—Suit by second mortgagee—Surplus sale-proceeds taken out by fourth mortgagee in execution of his decree—Third mortgagee if may sue to recover amount realised by fourth mortgagee—Civil Procedure Code (Act V of 1908), sec. 73 (1) proviso, cl (c).

A second mortgagee obtained a decree on his mortgage, in execution of which the property was sold and purchased by the third mortgagee. There was a surplus of sale-proceeds left after satisfying the decree. The fourth mortgagee thereafter sued on his mortgage, without making the third mortgagee a party and in execution of the decree obtained by him withdrew a portion of the surplus sale-proceeds. The third mortgagee thereafter, without seeking to put his mortgage in suit, sued the fourth mortgagee to recover the amount of the surplus sale-proceeds withdrawn by the latter:

Held— *That the Plaintiff could not succeed on this footing.*

BERHAMDEO PERSHAD *v.* TARA CHAND (1), *referred to.*

Cl. (c) of proviso to sub-sec. (1) of sec. 73 of the Civil Procedure Code does not apply to this case as the Plaintiff was not the holder of any decree.

This was an appeal preferred on the 21st of November 1910 against a decree of G. J. Monahan, Esq., District Judge of Zilla Patna, dated 14th June 1910, reversing a decree of Babu Umesh Ch. Sen, Subordinate Judge at Patna, dated 3rd March 1910.

The material facts will appear from the judgment.

Babu Umakali Mukerjee and *Maulvi Muhammad Mustafa Khan* for the Appellant.

Dr. Rash Behary Ghosh, Babu Soroshi Ch. Mitter and *Surendra Krishna Dutt* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

CARNDUFF, J.—This second appeal arises

(1) I. L. R. 33 Cal. 92 (1905).

NATHAN SAO v. MRS. ANNIE BESANT.

out of a suit brought by one of four successive mortgagees to recover the surplus sale-proceeds which a mortgagee subsequent to him had withdrawn from Court in satisfaction of his decree.

It appears that the second mortgagee of the property mortgaged had brought a suit on his mortgage and obtained a decree, in execution of which the property, worth Rs. 7,29,000, was sold and purchased by the third mortgagee for Rs. 36,000. The decree was fully satisfied from the sale-proceeds, and a surplus of approximately Rs. 6,000 was left in deposit.

The fourth mortgagee then sued on his bond, obtained a decree and, in satisfaction thereof, withdrew from Court Rs. 2,878 of the deposit there held. To this suit the third mortgagee was not made a party.

The third mortgagee has not so far attempted to enforce his security; but he brought the suit before us now in order to recover from the fourth mortgagee the sum that the latter had withdrawn. The Court of first instance dismissed his suit, but the lower Appellate Court has held that he is entitled to succeed, and has remanded the case for an enquiry as to the precise amount that should be decreed in his favour.

The learned District Judge in the Court of appeal below has relied upon *Berhamdeo Pershad* v. *Tara Chand* (1), but it seems to me that that case not only is indistinguishable from the present case, but actually stands in the way of the Plaintiff instead of supporting his claim. In it, a third mortgagee had obtained a decree on his mortgage without making a second mortgagee a party, and had withdrawn the surplus sale-proceeds held in deposit after the satisfaction of a first mortgagee's decree. The second mortgagee then sued to recover the deposit from the third mortgagee: but he put his mortgage in suit, and he succeeded on the plea that he was entitled in equity to regard the surplus sale-proceeds as part of his mortgage security and to follow them in the hands of the third mortgagee. As pointed out by Mr. Justice Sale, he could establish his right to the money, not as the owner thereof, but as part of his security. Here, however, the third mortgagee has endeavoured to do precisely what Mr. Justice Sale observed that it was not open to a person in his position to do: he has brought a simple money suit, claiming the money as his own and making no claim at all against the mortgagor. He cannot, as it seems to me, succeed on this footing.

The learned Vakil for the Respondent-Plaintiff has, however, further argued that his client is entitled to have the surplus sale-proceeds rateably applied to the discharge of his incumbrance by virtue of the provisions of cl. (*c*) of the proviso to sub-sec. (*1*) of sec. 73 of the Code of Civil Procedure, 1908. But those provisions operate, as the earlier part of the sub-section shows, only where the litigant concerned has himself obtained a decree and applied for rateable distribution in execution thereof; whereas, as has already been stated, the Respondent-Plaintiff holds no decree for the satisfaction of which by rateable distribution he could apply under the section.

In my view, therefore, this appeal should be allowed, the order of the lower Appellate Court discharged, and the decree of the first Court dismissing the suit restored with costs throughout.

HARINGTON, J.—I agree.

Appeal allowed.

(1) I. L. R. 33 Cal. 92 (1905).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 530 OF 1909.

MOOKERJEE, J. BEACHCROFT, J. 1912, Heard, 16 & 17, December and 1913, 18, February. 1914, Judgment, 19, June.	NARENDRA CHANDRA MANDAL and others, Defendants, Appellants, *v.* JOGENDRA NARAYAN ROY and ors., Plaintiffs, Respondents.

Execution sale, decree reversed after—Purchases in parts by decree-holder, by a Defendant not a judgment-debtor and by a stranger, how affected—Mother of infant Defendants appointed guardian without express consent—Decree if binds infants—Infants' interest if passes at sale.

A Court is not competent to appoint the mother of infant Defendants their guardian ad litem *without her express consent.*

Where in a mortgage suit the mother, who was proposed by the Plaintiff as guardian, did not appear or signify her willingness to act as guardian ad litem *of the infant Defendants, but the Court nevertheless appointed her guardian and the suit ended in a decree, and a sale of the infants' and others' properties* :

Held—*That the infants were not properly before the Court and were not bound by the decree, and the sale did not pass the right, title and interest of the infants.*

Where a decree is set aside subsequently to a sale in execution of the decree, the sale will be cancelled if the purchase has been made by the decree-holder but not when the purchaser is a stranger.

The sale will also be cancelled when the purchaser though not the decree-holder is one who was a party to the proceeding.

Though r. 4 of Or. 34 of the Civil Procedure Code contemplates a sale of the mortgaged properties, the decree must be suitably modified in exceptional circumstances, e.g., when the mortgaged properties have already been converted into money by operation of law.

This was an appeal from a decree of Mr. S. B. Choudhuri, District Judge, Birbhum, dated 3rd September 1909.

The material facts will appear from the judgment.

Babu Samatul Chandra Dutta for the Defendants-Appellants.

Babus Lalit Mohun Ghose and *Karunamoy Ghose* for the Plaintiffs-Respondents.

Dr. Rash Behari Ghose, Babus Gunada Charan Sen and *Surendra Nath Das Gupta* for the Defendants-Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal is directed against a decree in a suit to enforce a mortgage security. To appreciate the questions raised herein, it is necessary to examine the relevant facts as they appear on the record.

On the 1st June 1898, Krishna Chandra Mandal (the first Defendant) and Dukhbhanjan Mandal (since deceased and now represented by his infant sons, the second and third Defendants) executed the mortgage bond in suit in favour of Jogendra Narayan Roy and Mohendra Narayan Roy. The principal money secured was Rs. 4,999, which carried interest at 10½ per cent. per annum and was repayable on the 12th April 1899. On the 12th April 1905, the mortgagees commenced the present suit to enforce their security. They joined fourteen persons as Defendants. Of these, the first three were one of the original mortgagors and the two infant sons of the other mortgagor. The remaining Defendants were persons who, it was alleged, had acquired an interest in the equity of redemption by purchase, settlement, mortgage and otherwise and were consequently necessary parties as

entitled to redeem the Plaintiffs. On the day that the suit was instituted, the Plaintiffs applied for appointment of guardians *ad litem* of the infants Defendants, and proposed their mother as a suitable person. Notices were served upon the infants and the proposed guardian. The mother, however, did not enter appearance and signify her willingness to act as guardian of her sons. Yet the Court proceeded, at the instance of the Plaintiffs, to appoint her guardian of the infants for the purposes of the suit. There was no appearance on behalf of the infants at any stage of the suit; but some of the other Defendants filed written statements. On the 15th December 1905, the Court proceeded to decree the suit *ex parte* as against Defendants Nos. 1, 2, 3, 10, 11, 12 and 13, on a compromise as against Defendants Nos. 5, 6, 7, 9 and 14 and apparently on contest as against Defendants Nos. 4 and 8. On the 25th June 1906, the mortgagees applied for an order absolute, whereupon notices were directed to issue upon the Defendants. On the 25th July 1906, the first Defendant as also the mother of the second and third Defendants applied to the Court to set aside the *ex parte* decree. They alleged that no summons in the suit had ever been served upon them and that there were substantial defences to the claim, and they prayed upon them and that there were substantill the matter had been investigated. This application was made by a pleader on the strength of a *vakalatnama* given by the mother of the infants on the 24th July 1906, authorising him to take necessary steps to oppose the grant of the application for order absolute. On the 25th October 1906, the Court dismissed the application to set aside the decree, and on the 13th November 1906 made the decree absolute. On the 17th January 1907 the Petitioners, who had unsuccessfully applied to set aside the decree, preferred an appeal to this Court against the order dismissing their application. On the 8th January 1908, this Court heard the appeal and set aside the *ex parte* decree as against the three Petitioners and directed the suit to be reheard in so far as they were concerned. As regards the infant Appellants, this Court held that they were not parties to the suit, as no guardian had ever been appointed for them in accordance with law, and they would consequently not be bound by the decree. This Court was not apprised at the time, that, during the pendency of the appeal, the decree had been executed and the mortgage properties sold. In fact, on the 4th February 1907, the lower Court proceeded, at the instance of the mortgagees-decree-holders, to sell the properties; many of these were purchased by the decree-holders themselves; some were purchased by the Defendants other than the mortgagors; a few were purchased by persons who were neither Plaintiffs nor Defendants and were entire strangers to the proceedings. The sale was confirmed on the 8th April 1907, and on various dates between April and November 1907, possession was delivered to the purchasers. On the 24th March 1908, that is, shortly after the *ex parte* decree had been set aside by this Court, the first three Defendants applied to the Court below to set aside the sale. Petition of objection was filed by two only of the purchasers, one of whom was a party to the suit (Defendant No. 12). On the 31st July 1908, the Subordinate Judge dismissed the application on the ground that third parties were not affected by the cancellation of the decree. The suit which, by order of this Court, stood revived against the mortgagors, was then taken up for re-trial, and on the 16th December 1908, they filed their written

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statement. On the 3rd September 1909, the District Judge, who took up the case for disposal, overruled the defences on the merits and made his decree. This decree directs the mortgagors to pay up the mortgagees within three months, and, on default, entitles the latter to take the sale-proceeds of the mortgaged properties purchased by third parties in satisfaction of their decree. A provision is added that, should this prove insufficient, the mortgagees will have the right to realise the balance by sale of the remaining mortgage properties. The decree, it will be observed, does not specify what is meant by " third party ", whether it includes only a person who is not a party to the mortgage suit or includes all persons other than the Plaintiffs-mortgagees. The mortgagees-Defendants have now appealed to this Court, and have contended that the decree as drawn up is not in accordance with r. 4 of Or. 34 of the Code and that, in the events which have happened, all the mortgage properties should be directed to be sold afresh.

It is plain that the two infant Defendants have not been affected in any way by the sale held on the 4th February 1907, because there was at the time no valid and operative decree in force against them. They were not properly parties to the mortgage suit. It was not competent to the Court to appoint their mother as guardian *ad litem* without her express consent. The Court acted contrary to what was the established rule on the subject: *Dhoniba* v. *Kusa* (1), *Babajiban* v. *Maruti* (2), *Issur Chandra* v. *Nobokristo* (3), *Narsingh Narayan* v. *Jahi Mistry* (4), *Balkishen* v. *Topeswar* (5) and *Dinabandhu* v. *Mashuda* (6). The position, consequently, was that the infants were not properly before the Court, and are in no way bound by the decree of the 15th December 1905. The sale held under these circumstances did not pass the right, title and interest of the infants: *Khirajmal* v. *Diam* (7), *Rashidunnessa* v. *Ismail Khan* (8) and *Kishan Chandra* v. *Ashoorun* (9). It is consequently indisputable that every one of the purchasers at the execution sale, held on the 4th February 1907, has failed to acquire the right, title and interest of the infant Defendants in the mortgage properties. Such purchasers may have imagined that the infants were bound by the decree and may have paid the purchase money on the assumption that they were acquiring the interest of all the mortgagors. But that clearly cannot affect the position of the infants who are bound neither by the decree nor by the sale consequent thereon. It is thus necessary, for the protection of the purchasers themselves, that the properties should be re-sold on the footing of a fresh decree binding on the infants in the suit as reconstituted.

Apart from this question, the effect of the cancellation of the decree by this Court on the 8th January 1908, upon the sale held on the 4th February 1907, requires examination. Two positions are clear and incontestable, namely, *first*, that the purchase made by the decree-holders themselves must be treated as cancelled, and, *secondly*, that the purchase made by persons who are not parties to the suit must be treated as unaffected: *Zainul Abdin* v.

(1) 6 Bom H C R. 219 (1869).
(2) 11 Bom H C R 182 (1874).
(3) 7 C. L. R. 707 (1880).
(4) 15 C. L. J. 3 (1911).
(5) 15 C. L. J. 446 (1911).
(6) 16 C L J 315 (1912)
(7) L. R. 32 I. A. 23: s. c. I. L. R. 32 Cal. 296; 9 C. W. N. 201 (1904).
(8) L R 36 I. A. 168: s. c. 10 C. L. J. 318; 13 C. W. N. 1182 (1909).
(9) Marshall 617 (1863).

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Ashgar Ali (10), *Jan Ali* v. *Jan Ali* (11), *Chunder Kant* v. *Bissesar* (12), *Mukhoda* v. *Gopal Chandra* (13), *Indurjeet* v. *Pootee Begum* (14), *Shiblal* v. *Sambhuprasad* (15), *Janakdhari* v. *Gossainlal Bhaya* (16), *Chandan* v. *Ramdeni* (17) and *Dorasami* v. *Annasami* (18). The question arises, however, as to the position of a purchaser who is not a stranger to the suit, but is a Defendant therein; is his position analogous to that of the Plaintiff or of an absolute stranger to the proceedings? The answer to this question must depend upon the reasons for the rule that a stranger who purchases in execution of a decree is not affected by the subsequent cancellation or reversal of the decree. Sir Barnes Peacock in *Zainul Abdin* v. *Ashgar Ali* (10) refers to a passage from Bacon's Abridgment, Tit Error (M. 3), which runs as follows:—"If a man recovers damages and hath execution by fieri-facias, and upon the fieri-facias the Sheriff sells to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold and not to the term itself; because the Sheriff had sold it by the command of the writ of fieri-facias". This statement of the law is supported by a long series of early cases: *Anon* (19), *Luddington* v. *Amnen* (20), *Beverley's* case (21), *Eyre* v. *Woodfine* (22), *Anon* (23), *Hoe's* case (24), *Manning's* case (25), *Drury's* case (26), *Goodyere* v. *Ince* (27) and *Doe* v. *Thorn* (28). An examination of these cases shows that protection is afforded to the purchaser, only when he is a stranger to the suit. This is clear when we examine the reasons assigned in support of the rule. Thus in *Bennett* v. *Hamill* (29), Lord Redesdale justified the rule on the principle that the stranger who purchases has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties and has on such investigation properly decreed a sale. To the same effect is the observation of Sugden, L. C., in *Bowen* v. *Evans* (30). The principle was affirmed by the House of Lords in *Bowen* v. *Evans* (31) and *Tommey* v. *White* (32) and by the Supreme Court of the United States in *Gray* v. *Brignardello* (33), *Beauregard* v *New Orleans* (34) and *Grignon* v. *Astor* (35). The reason for the rule is uniformly stated to be that the stranger purchaser cannot be expected to go behind the judgment, to enquire into irregularities in the suit, and that it is sufficient for him to know that the Court had jurisdiction and exercised it and that the order on the faith of which he purchased was made and did authorise the sale. To the same effect is the observation of the Judicial Committee

(10) L. R. 15 I. A. 12: s. c. I. L. R. 10 All, 166 (1887).
(11) 1 B. L. R. A. C. J. 56; 10 W. R. 154 (1868).
(12) 7 W. R. 312 (1867).
(13) I. L. R. 26 Cal. 734 (1899)
(14) 19 W R. 197 (1873).
(15) I. L. R. 29 Bom. 435 (1905).
(16) I. L. R. 37 Cal. 107 (118) (1909).
(17) I. L R. 31 Cal. 499 (1904).
(18) I. L. R. 23 Mad. 306 (1899).
(19) Dyer 363a.
(20) Godb. 27; 2 Leon 92; 3 Leon 89.
(21) Gouls 103.
(22) Cro. Eliz. 278.
(23) Moore 573.
(24) 5 Coke 90b (1600).
(25) 8 Coke 94b (1610).
(26) 8 Coke 141b (1611).
(27) Cro. Jac. 246.
(28) 1 M. and S. 425 (1813).
(29) 2 Sch. and Lef. 506 (1806).
(30) 1 J. and L. 178 (259); 6 Ir. Eq. Rep. 569 (1844).
(31) 2 H. L. C. 257 (1848).
(32) 3 H. L. C. 49 (1850).
(33) 1 Wallace 627 (634).
(34) 18 Howard 497.
(35) 2 Howard 219.

in *Rewa Mahtan* v. *Ram Kishen* (36) and *Zainul Abdin* v. *Ashgar Ali* (10). The reason for the rule obviously disappears when the purchaser is himself a party to the suit and has notice, or at least opportunity of knowledge, of all the proceedings therein. The case is clearly one for the application of the maxim, *cessante ratione legis, cessat ipsa lex*, when the reason of any particular law ceases, so does the law itself. The question has been raised in the Courts of the United States and it has been held that a purchaser at a judicial sale who is a party to the proceeding and in interest is not a *bonâ fide* purchaser to the extent that will protect his purchase in case of a reversal of the decree by authority of which it is made [*Buchanan* v. *Clark* (37)], the condition of such a purchaser is unlike that of an absolute stranger to the proceedings who becomes a purchaser under the decree; such stranger is protected, but the sale fails on reversal of the decree as to the purchaser who is a party in interest or to the proceedings. There is only one solitary decision, *Gossom* v. *Donaldson* (38), where it was held that the protection afforded to strangers should also be extended to parties to the suit including the Plaintiff-decree-holder himself. This case stands alone, and the extreme view taken therein has been adversely criticised by text-writers [Kleber on Judicial Sales, secs. 201, 202 and 291; *Baker* v. *Baker* (39)]. The decision in *Macbride* v. *Longworth* (40) is not contrary to this view, as that case turned upon a statute which afforded protection to all execution purchasers whether strangers or parties to the suit; in fact, the view taken in *Buchanan* v. *Clark* (37) is identical with that taken in *Hubbel* v. *Broadwell* (41) and *Walpole* v. *Ink* (42) (Roper on Judicial Sales, secs. 132—134). It is obviously essential, however, that for the reversal of the sale, the person whose property has been sold must be a party to the proceedings: *Withers* v. *Little* (43), *Little* v. *Superior Court* (44) and *Withers* v. *Jacks* (45) (Freeman on Executions, sec. 347). The rule that a stranger purchaser is not affected by the reversal of the decree is based, as the cases show, on grounds of public policy, though it operates harshly upon the person whose property has been sold and who, it may turn out, in the end, was not liable at all to the Plaintiff. We are not prepared to extend the scope of the rule and to apply it for the benefit of parties to the suit, in whose case the reason for the rule has no application. Consequently, all the properties which have been purchased by parties to the suit must be resold, if necessary, in execution of the decree now to be made.

We may add that we do not feel pressed by the argument that the decree made by the Subordinate Judge is not in conformity with r. 4 of Or. 34 of the Code. That rule no doubt contemplates a sale of the mortgaged properties, but the decree must be suitably modified in exceptional circumstances where a sale of the mortgaged properties may be impossible, for instance, where the mortgaged properties have been sold for arrears of revenue, for arrears of rent or as here in execution of a decree; in such cases, where the property

(10) L. R. 15 I. A. 12: s. c. I. L. R. 10 All. 166 (1887).
(36) L. R. 13 I. A. 106: s. c. I. L. R. 14 Cal. 18 (1886).
(37) 10 Grattan (Va) 164.
(38) 18 B. Mon. 230; 68 Am. Dec. 723.
(39) 87 Ky. 461.
(40) 14 Ohio St. Rep. 349; 84 Am Dec. 383.

(37) 10 Grattan (Va) 164.
(41) 8 Ohio 120.
(42) 9 Ohio 143.
(43) 56 Cal. 370.
(44) 74 Cal. 219.
(45) 79 Cal. 297; 12 Am. St. Rep. 143.

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can no longer be reached, either in whole or in part, the Court is competent, in the exercise of its inherent power, to give appropriate directions for the disposal of the fund which represents the property.

The result is that this appeal is allowed, the decree of the District Judge discharged, and the case remanded to him in order that the necessary accounts may be taken and the final decree drawn up. An account will first be taken of the sum due to the Plaintiffs upon the mortgage of the 1st June 1898. An account will then be taken of the sums realised by the Plaintiffs from the properties purchased by them on the 4th February 1907, and of which, it is said, they have taken possession. Both these accounts will be taken up to the date of this judgment. The difference between these two sums will be taken and will be reduced by the sum realised by the sale of the mortgaged properties to strangers to the suit. A decree will be made in favour of the Plaintiffs for this reduced sum and the sum decreed will carry interest at 6 per cent. per annum from this date. The judgment-debtors will be allowed to pay up the money within three months from the date when the decree of the Court below is drawn up and signed. If the amount is not so paid, the mortgaged properties other than those sold to strangers on the 4th February 1907 will be sold by the Court for the satisfaction of the decretal amount, after the usual order absolute has been made. Each party will pay his own costs of the suit up to the present stage. The costs of the enquiry in the Court below will be in the discretion of that Court. The District Judge will be at liberty to take the accounts himself or to transfer the case for disposal to the Subordinate Judge.

We do not at this stage consider the question of restitution by the Defendants-purchasers to the mortgagors-Defendants on account of their possession of the properties they had purchased on the 4th February 1907. Such question may be determined on application to the Court by which the sale was held: *Beni Madhab Singh* v. *Pran Singh* (46) and *Raghu Singh* v. *Sheo Prasad* (47).

Let the records be sent down at once.

Appeal allowed.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE No. 2056 OF 1910.

MOOKERJEE, J.
BEACHCROFT, J.
1913,
Heard, 9 and 11, April.
1914,
Judgment, 26, May.

KULODA PROSAD DEGHORIA, Defendant, Appellant,
v.
KALIDAS NAIK and ors., Plaintiffs, Respondents.

Debutter *grant—Document ambiguous—Question whether grant absolute to idol or to* shebait *personally, subject to a charge for worship—Evidence of dealing with property when admissible—Intention, question as to.*

Where the deed of grant under which property is claimed to be debutter *is ambiguous, the Court may determine the true character of the endowment from the manner in which the dedicated properties have been held and enjoyed.*

Where by the first of two grants (described as a debutter patta), *village J was given for the* sheba *of goddess K and the grantee D was directed to bless the grantor and enjoy the land peacefully; and, by the second, village D was granted as rent-free* debutter *through the grantee D for the* sheba *of the same goddess and the grantee was directed to enjoy the land from genera-*

(46) 15 C. L. J. 187 (1911).
(47) 16 C. L. J. 135 (1912).

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tion to generation after performance of the sheba *of the goddess*:

Held—*That the language of the deeds was ambiguous and the Courts below had rightly concluded from the manner in which the properties had been enjoyed, that the properties granted were not absolute* debutter *properties of the goddess, but were the personal properties of the grantee subject to the charge of the worship of the goddess.*

The rule that in the construction of ancient grants and deeds evidence is admissible as to the manner in which the thing granted has always been possessed and used does not apply where there is no ambiguity, for even usage does not justify deviation from terms which are plain.

DOE v. REES (12) *and* N. E. R. CO. v. HASTINGS (13), *referred to.*

This was an appeal from the decision of E. B. H. Panton, Esq., District Judge, Burdwan, dated 12th March 1910, confirming that of Babu Atul Chandra Batabyal, Subordinate Judge, Burdwan, dated 2nd January 1909.

The facts of the case material to this report will appear from the judgment.

Babus Golap Chandra Sarkar, Sarat Chandra Dutta, Norendra Kumar Bose, Biraj Mohan Majumdar and *Rishindra Nath Sarkar* for the Appellant.

Dr. Rash Behary Ghosh and *Babu Bepin Behary Ghosh* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the first Defendant in a suit for recovery of possession of immoveable property on declaration of title. The Courts below have concurrently found in favour of the Plaintiffs, and have given them a decree, on declaration that their title has not been affected by the sale in execution of a rent-decree in a fraudulent suit for recovery of alleged arrears of rent. On the present appeal, one substantial question of law has been argued touching the validity of the title of the Plaintiffs which is based ultimately on two permament leases granted by a *shebait* in respect of the properties of a religious endowment. The facts, antecedent to this litigation, though of complex character, may be briefly narrated in so far as such recital is necessary for the appreciation and determination of the question of law raised before us.

The disputed properties lie within the zamindary of the Maharaja of Pachete. In the early years of the 19th century the then Maharaja made two grants in favour of one Deb Nath Deghoria, the predecessor of the Appellant. The first of these grants was described as a *debutter patta* of village Jamur Kuri given for the *sheba* of goddess Kalyaneswari. The grantee was directed to bless the grantor and to enjoy the land peacefully. In the second deed, village Debipore was granted as rent-free *debutter* through the grantee for the *sheba* of the same goddess, and the grantee was directed to enjoy the land from generation to generation after performance of the *sheba* of the goddess. The controversy between the parties relates to the true nature of these grants. On behalf of the Defendant-Appellant, it has been contended that the dedication was of the completest character known to law—to use the language of their Lordships of the Judicial Committee in *Jagadindra* v. *Hemanta Kumari* (1), that the properties consequently vested absolutely in the goddess and it was not competent to the *shebait* to grant a permanent

(12) 8 Bing. 181 (1832).
(13) [1900] App. Cas. 260.

(1) L. R. 31 I. A. 203: s. c. I. L. R. 32 Cal. 129; 8 C. W. N. 809 (1904).

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lease of any portion thereof as was done to the predecessor of the Plaintiff. On behalf of the Plaintiffs-Respondents, it has been argued, on the other hand, that the properties, after the grants, retained their secular character, though they became impressed thereby with a religious charge, as in the case of *Asutosh* v. *Durga* (2). The Courts below have concurrently accepted the contention of the Plaintiffs-Respondents, which, in their opinion, is consistent with the terms of the deeds and also with the manner in which the dedicated properties have been held and enjoyed for nearly a century. This view has been assailed on behalf of first Defendant, who claims to be the present *shebait* of the endowment, and maintains that the properties in suit are the absolute *debutter* of the goddess. In support of this view, reliance has been placed upon the decision of their Lordships of the Judicial Committee in *Abhiram Goswami* v. *Shama Charan Nandi* (3). In our opinion, the decision mentioned does not assist the Appellant. The two deeds are at least ambiguous, for although the properties are described as *debutter*, yet they are given to the grantee, who is to enjoy them, from generation to generation on performance of the *sheba* of the goddess. The view may reasonably be maintained that the grants were not made to the goddess herself but were made to Deb Nath Deghoria in order that he might, on performance of the *sheba* of the goddess, enjoy the properties from generation to generation. In these circumstances, the Court may determine the true character of the endowment from the manner in which the dedicated properties have been held and enjoyed [*Gunga* v. *Brindabun* (4), *Muddun* v. *Komal* (5), *Ram Chandra* v. *Ranjit Singha* (6), *Madhub* v. *Sarat* (7), *Tulsi* v. *Siddhi* (8) and *Mohun* v. *Tekait* (9)]. But it has been strenuously contended on behalf of the Appellant that the Court is not entitled to look to the conduct of the parties for assistance in the construction of the grants. This argument is opposed to the well-established rule that, in the construction of ancient grants and deeds, evidence is admissible as to the manner in which the thing granted has always been possessed and used, for so the parties thereto must be supposed to have intended [*Wild* v. *Hornby* (10) and *R.* v. *Osbourne* (11)]. As Tindal, C. J., observed in *Doe* v. *Rees* (12), the Court may call in aid acts under the deed as a clue to the intention. This principle, as was pointed out by Lord Halsbury, L. C., in *N. E. R. Co.* v. *Hastings* (13), does not apply unless there is an ambiguity, for even usage does not justify deviation from terms which are plain [*Attorney-General* v. *Rochester* (14) and *Attorney-General* v. *Sidney Sussex College* (15)]. Consequently while in a case of ambiguity the Court will uphold that construction of a deed which justifies a long usage as to the application of trust funds, the Court will not, where there is no ambiguity, accept an erroneous interpretation, though consistent with usage, so as to sanction a manifest breach of trust.

(2) L. R. 6 I. A. 182 : s. c. I. L. R. 5 Cal. 438 (1879).
(3) L. R. 36 I. A. 148 : s. c. I. L. R. 36 Cal. 100 (1909).

(4) 3 W. R. 142 (1865).
(5) 8 W. R. 42 (1867).
(6) I. L. R. 27 Cal 244 (252) : s. c. 4 C. W. N. 405 (410) (1899).
(7) 15 C. W. N. 126 (1910).
(8) 9 Ind. Cas 650 (1911).
(9) 19 Ind. Cas. 837 (1913)
(10) 7 East 199 ; 8 R. R. 608 (1806)
(11) 4 East 327 (1803).
(12) 8 Bing. 181 (1832).
(13) [1900] App. Cas. 260.
(14) 2 DeG. M. and G. 797, 882 (1854).
(15) L. R. 4 Ch. App. 722 (1869).

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[*Drummond* v. *Attorney-General* (16).] The matter may be put briefly in the words of Sugden, L. C., in *Attorney-General* v. *Drummond* (17) : " One of the most settled rules of law for the construction of ambiguities in ancient instruments is that you may resort to contemporaneous usage to ascertain the meaning of the deed ; tell me what you have done under such a deed, and I will tell you what that deed means ". To this must be added the qualification formulated by Lord Cranworth, L. C., in *Sadlier* v. *Biggs* (18) in the following terms ; " If there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something else, merely because the parties have gone on for long time so understanding it ". In the case before us, the terms of the deed are at best inconclusive, and the Courts below have properly referred to the manner in which the dedicated properties have been held and enjoyed. It appears that within a few years of the grants in favour of Deb Nath Deghoria, the properties were partitioned between him and his brother Shib Nath Deghoria, and on 2nd August and 4th September 1829, the representatives of the two branches of the Deghoria family executed two permanent leases in respect of their different shares. These leases were not challenged for at least 60 years, either by any of the *shebaits* or by the successive Rajas of Pachete who are intimately concerned in the proper maintenance of the endowment created by one of their ancestors. These leases form the root of the title of the Plaintiffs, and the Court will be slow to listen to the suggestion that they were granted by the then *shebaits* in excess of their authority and consequently constituted acts in the nature of breaches of trust. The Courts below have further found that the properties have been throughout held and enjoyed by the Deghorias as secular properties subject to a religious charge, and that while a part of the income of the worship has been applied for the performance of the worship of the goddess, the remainder has been used by the members of the family for their own purposes. Under these circumstances, the Courts below have rightly concluded that the properties in dispute are not absolute *debutter* properties of the goddess, but are the personal properties of the Deghorias subject to the charge of the worship of the goddess. In this view, the permanent leases of 1829 are not liable to be impeached and afford a solid foundation for the title of the Plaintiffs.

We may add that on behalf of the Respondents it was argued that the question of the true character of the endowment was immaterial, because, as the permanent leases of 1829 have never been impeached, any suit now instituted for cancellation of those leases and for resumption of the properties from the leases or their representatives would be successfully met by the plea of limitation. This contention is supported by the decision of this Court in *Jogamba Goswamini* v. *Ram Charan Goswami* (19) and by that of their Lordships of the Judicial Committee in *Damodar Das* v. *Lakhan Dass* (20) as explained in the case of *Madhusudan Mandal* v. *Radhika Prosad Das* (21). The permanent leases have consequently become indefeasible by lapse of time, and from this point of view also, there is no answer to the claim of the Plaintiffs.

It was faintly suggested that the suit

(16) 2 H. L. C. 837 at pp. 861, 863 (1849).
(17) 1 Dr. and War. 353 at p. 368 (1842).
(18) 4 H. L. C. 435 at p. 458 (1853).
(19) I. L. R. 31 Cal. 314 (1903).
(20) I. L. R. 37 Cal 885 (1910).
(21) 16 C. L. J. 349 (1912).

was improperly constituted and that there had been a misjoinder of Plaintiffs. The District Judge has pointed out that there is no substance in this contention. But even if the objection were well-founded, it would not be a ground for reversal of the decision of the primary Court under sec. 99 of the Code of Civil Procedure of 1908, which was in force when the appeal was preferred to the District Judge. It was also sought to be argued that the suit was barred by limitation, treated as a suit for declaration of title, and reference was made to the case of *Mahabharat Saha* v. *Abdul Hamid* (22) and *Legge* v. *Rambaran* (23). The suit, however, is essentially one for possession of property, and the Plaintiffs are not called upon to ask for cancellation of any execution sale, because no operative sale has ever taken place.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE No. 2212 OF 1912.

D. CHATTERJEE, J. MULLICK, J. 1914, Heard, 19 and 20, November. Judgment, 11, December.

KHETTRAMANI DASI, Defendant No. 1, Appellant, *v.* JIBAN KRISHNA KUNDU & anr., Plaintiffs, Respondents.

Sundarbans, lessee from Government of lands in—Permanent tenure granted by lessee—Condition that rent will not abate in case of diluvion, if valid—Onus of proof—Reg. III of 1828, sec 13—Bengal Tenancy Act (VIII of 1885), secs 52, 179, 188—Suit for abatement by co-sharer tenant if lies—Contract Act (IX of 1872), sec. 28.

Sec. 188 of the Bengal Tenancy Act does not apply to joint tenants, and a suit by a co-sharer for abatement of rent is maintainable.

Where tenants took a permanent lease of lands in the Sundarbans stipulating that "we shall not object to the payment of rent on the ground of drought, inundation, death, desertion, overflow of salt water, diluviation by river, etc.":

Held—*That it was for the tenants if they impeached this stipulation as being inconsistent with the provisions of sec. 52 of the Bengal Tenancy Act to establish that the tenure was not situated in a permanently settled area.*

Sec. 13 of Reg. III of 1828 does not ignore or invalidate any permanent settlements made by Government before 1828. It also authorises similar settlements subsequently made by Government. It is therefore erroneous to hold that there could not be a permanent tenure in the Sundarbans.

That the stipulation barred not only a plea of reduction of rent in defence, but also a suit for abatement of rent.

(22) 1 C. L. J. 78 (1904).
(23) I. L. R. 20 All. 35 (1897).

This was an appeal preferred on the 18th June 1912 against a decree of the District Judge of 24-Parganas, dated the 18th June 1912, reversing a decree of Babu Atul Chandra Batabyal, Subordinate Judge of Alipore, dated 19th August 1911.

The material facts will appear from the judgment.

Babus Nil Madhab Bose and *Sarat Ch. Ghosh* for the Appellant.

Babus Mohini M. Chatterjee, Amarendra Bhusan Ghosh and *Biraj Mohan Majumdar* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

D. CHATTERJEE, J.—The predecessors-in-interest of the Plaintiffs and the *pro*

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formâ Defendants took a *maurasi mokurari* lease of about 2,200 bighas of land in two plots, one of 800 bighas and the other of 1,400 bighas, in the Sundarbans from the predecessor-in-interest of the Appellant and executed a *kabuliyat*, dated the 23rd of April 1890. Under the terms of the *kabuliyat*, there was a measurement in 1303 B. S. made by a Civil Court amin and the *mokurari* rent was fixed at the full stipulated rate of 12½ annas per bigha on the quantity of land found. The Plaintiffs who by an amicable arrangement with the *pro formâ* Defendants hold the smaller plot have brought the present suit for abatement of rent under sec. 52, cl. (*b*), of the Bengal Tenancy Act in respect of the whole tenure on the allegation that there had been a reduction of about 600 bighas in the area of the entire tenure by diluvion and joining the *pro formâ* Defendants as parties on the ground that they had refused to join as Plaintiffs. The main objections to the suit pressed on behalf of the Appellant are :-- (1) That the present suit for abatement is not maintainable by the Plaintiffs alone as they are admittedly part-owners of the tenure and sec. 188 of the Bengal Tenancy Act is a bar to the suit; (2) That under the express terms of the *kabuliyat* the Plaintiffs are debarred from bringing a suit for abatement on the ground of diluvion.

The first objection is easily disposed of. Sec. 188 of the Bengal Tenancy Act prevents a co-sharer landlord from bringing any suit authorised by the Act unless his other co-sharers join him as Plaintiffs. This section has no reference to joint tenants and cannot be applied by analogy to a co-sharer tenant who brings a suit authorised by the Act. This view is supported by an opinion expressed by Sir Francis Maclean, C. J., and Banerjee, J., in the case of *Bhoopendra Narain Dutt* v *Romon Krishna Dutt* (1). The decision of the Privy Council in the case of *Jatindra Nath Chowdhuri* v. *Prasanna Kumar Banerji* (2) has reference to a suit for enhancement by a co-sharer landlord and cannot be called in aid of the Appellant's plea.

Then as to the second point the condition in the *kabuliyat* is—"we shall not object to the payment of rent on the ground of drought, inundation, death, desertion, overflow of salt water, diluviation by river, etc.". The learned Judge has got over this clause by holding that it refers to temporary impediments to the realisation of rent and could not have been meant to apply to a permanent reduction of the area. The document however does not seem to make any distinction between temporary and permanent impediments. The judgment of the learned Judge has been supported by an ingenious argument advanced by the learned Vakil for the Respondent. He argued, *first*, that the clause in question prevents the tenant from objecting to the payment of rent, and cannot stand in the way of his bringing a suit for abatement, and, *secondly*, that the Sundarbans not being a permanently settled area, sec. 179 of the Bengal Tenancy Act has no application, and the covenant in the lease, if it bears the meaning contended for by the Appellant, is inconsistent with the provisions of sec. 52, and is, therefore, void under sec. 23 of the Contract Act. As regards the first branch of this argument, I do not think it is sound. The only objection that the tenant could make on account of diluvion would be one of reduction of rent and seeing that the settlement is a *maurasi mokurari* one, the most reasonable construction is that the tenant agreed not to claim reduction on the

(1) I. L. R. 27 Cal. 417 (1899).
(2) 15 C. W. N. 74 (1910).

ground of diluvion. As regards the second branch of the argument, it assumes that the Sundarbans is not a permanently settled area. The learned Vakil for the Appellant states that the Appellant has got a permanent lease from the Government, but the learned Vakil for the Respondent does not ultimately admit this, although he at first said that the lease of the Appellant was of a permanent character. The learned Judge says: "The tenure being numerous in the Sundarbans cannot, in view of sec. 13, Reg. III of 1828, be held to be a permanent tenure". I do not quite understand what the learned Judge means. The section provides that the Sundarbans should be considered to be the property of the State not included in the arrangements of the perpetual settlement and the Governor-General in Council shall be competent to make grants of leases as heretofore, etc. The section therefore does not ignore or invalidate any grants made by the Government before 1828 and authorises further grants. In the case of *Tamasha Bibi* v. *Ashutosh Dhur* (3), Mr. Justice Banerjee is reported to have said: "I ought to add that though certain portions of Reg. III of 1828 go to show that the Sundarbans up to that date continued the property of the State and had not been permanently settled with any one, that was intended to be said generally with regard to the tract of country known as Sundarbans taken as a whole, and it could not have been intended to undo the effect of any lease granted by any duly constituted Revenue authority". The learned Judge is wrong therefore in holding that there could not be a permanent tenure in the Sundarbans. The case of *Tamasha Bibi* v. *Ashutosh Dhur* (3) further supports the contention that a part of the Sundarbans would be a permanently settled area even if settled after 1793, the definition in cl. 12 of sec. 3 of the Bengal Tenancy Act notwithstanding. The question therefore is whether the Appellant had a permanent lease from the Government in respect of the estate, a part of which they settled with the predecessor of the Plaintiffs. I think, the matter was never contested in the Courts below and was at first admitted in this Court. The *kabuliyat* mentions the property of the Appellant as zamindary Lot Abad Gatihara Tauzi Mahal No. 1374 and the very fact that the Plaintiffs and *pro formâ* Defendants have taken a permanent lease from a person who had made permanent improvements on the property is an indication that the Appellant had permanent rights. In any case, the *patta* contains the condition, and it is for the party who impeaches its legality to make out his case. The Respondent has not in this case shewn that the property is not in a permanently settled area, and he cannot ask us to make a remand for a further investigation on that point. I think, the covenant is authorised by sec. 179 of the Bengal Tenancy Act and the Plaintiffs cannot impeach its validity. In this view of the case, I think the appeal should be allowed and the suit ought to be dismissed with costs in all Courts.

An application has been made by one of the *pro formâ* Defendants, who was made a co-Plaintiff in the Court below, to be allowed to withdraw from the suit. If he is allowed to do so, he must continue as a *pro formâ* Defendant. In the view that I take of the case however, it is not necessary to pass any order on this application.

MULLICK, J.—I agree.

Appeal allowed.

(3) 4 C. W. N. 513 (517) (1900).

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM ORIGINAL DECREE
No. 11 OF 1912.

FLETCHER, J.
RICHARDSON, J.
1914,
Heard, 16 and 17, June.
Judgment, 25, June.

NEMO DEO, Plaintiff, Appellant,
v.
PARBATI KUMARI, Defendant, Respondent.

Sonthal Parganas Regulation (III o 1872), secs. 11, 14, 25, 25A—Effect of the Regulation on the jurisdiction of Civil Courts—Elements necessary or suit to come within sec 25A—Sikmi ghatwali khorposh *grant, share in, if a right o a "zamindar or other proprietor."*

The Plaintiff brought a suit for declaration of his title to a share in a certain mauza in the Sonthal Parganas which formed the subject of a sikmi ghatwali khorposh *grant and for registration of his name in the settlement records in respect thereof. It appeared that rent was payable to the ghatwals and no land-revenue was payable direct to the Government in respect of the land which was not free from Government revenue.*

Held—*That the effect of secs. 11, 14 and 25 of Reg. III of 1872 was that the jurisdiction of the Civil Courts was absolutely excluded except in cases specially provided for in sec. 25A.*

That in order that the Plaintiff's case should fall within the provisions of sec. 25A, it was essential for the Plaintiff to show that he was a zamindar or other proprietor, and the interest in land like that claimed by the Plaintiff did not come within the description of a right of "a zamindar or other proprietor".

That the only remedy the Plaintiff had was to apply to the Government under sec. 25 of the Regulation to direct the revision of the record-of-rights.

This was an appeal preferred on the 30th January 1912 against a decree of Mr. D. Sunder, Subordinate Judge of Deoghur; dated the 5th July 1911.

The facts of the case material to this report will appear from the judgment.

Babus Mohendra Nath Roy and *Surendra Nath Ghosal* for the Appellant.

Babu Naresh Chandra Sinha for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This is an appeal by the Plaintiff against the judgment of the Subordinate Judge of Deoghur, dated the 5th of July 1911.

The Plaintiff brought this suit for declaration of his title in a share in a certain mauza (Sankari) and for the registration of his name in the settlement records in respect thereof. The Subordinate Judge dismissed the suit on the ground that it was not maintainable. It appears that many years ago the Rohini ghatwals granted 25 villages as *khorposh* sikmi ghatwali tenures to the junior members of the family. In course of time these 25 villages were divided amongst the various junior members and it is common ground that Barras Deo, the common ancestor of the parties, held an 8 annas share in the Mauza Sankari.

Subsequently settlement proceedings were held under the provisions of the Sonthal Parganas Settlement Regulation (Reg. III of 1872). Barras Deo was then dead. The record-of-rights was published on the 13th of May 1904.

The entry so far as relates to the 8 annas share of Mauza Sankari was taken before the Commissioner.

The dispute before the Commissioner was between Peary Deo, one of the descendants of Barras Deo, on the one hand and certain other members of the family on the other hand.

The Commissioner by his order, dated

the 31st of October 1907, directed that the name of Peary Deo should be entered on the record as a *khorposhdar* and sikmi ghatwal of the 8 annas share of Mauza Sankari : according to the reasons given by the Commissioner he came to this conclusion on the ground that "Peary Deo is the principal representative of the descendants of the 3rd son of Parsi by that wife", that is Barras Deo.

Peary having been recorded in respect of the 8 annas in Mauza Sankari, the Plaintiff has brought this suit for declaration of his title and amendment of the record-of-rights.

The case has been argued before us solely on the question as to whether the present suit is maintainable having regard to the provisions of Reg. III of 1872. Sec. 11 of the regulation enacts that except as provided by sec. 25A no suit shall lie in any Civil Court regarding any matter decided by a Settlement Officer, but the decisions and orders of Settlement Officers shall have the force of a decree of Court. By sec. 12, Settlement Officers are given jurisdiction to inquire into, to decide and to record "any other landed rights to which by law or custom of the country or any tribe any person shall have a legal or equitable claim".

Sec. 14 provides that the Settlement Officer is to give notice that he is about to prepare a record-of-rights so that all persons may bring forward their claims. The Settlement Officer is however directed by the section to enquire into, settle, and record all rights or claims even though such claims or rights are not urged before him.

In addition, there are the provisions contained in sub-secs. (1) and (3) of sec. 25. Those provisions so far as it is necessary to state them for the present purpose make the record-of-rights conclusive proof of the rights and customs therein recorded and prohibit the record from being re-opened until a fresh settlement is made without the previous sanction of the Local Government. On these sections, I think, the jurisdiction of the Civil Courts is absolutely excluded except in cases specially provided for in sec. 25A of the Regulation. Now in order that the Plaintiff's case should fall within the provisions of sec 25A, it is essential for the Plaintiff to show that he is a zamindar or other proprietor. It is not suggested that the Plaintiff is a zamindar. Is he then a proprietor? The Regulation itself contains no definition of a proprietor. But when we consider the nature of the interest claimed, I think that the Plaintiff is not a proprietor.

The Plaintiff's claim is to a share of a sikmi ghatwali *khorposh* grant. Rent in respect of this is payable to the ghatwals, and no land-revenue is payable direct to the Government, nor is it suggested that the land is free from the Government revenue.

Such an interest in land does not, in my opinion, come within the description of a right of "a zamindar or other proprietor".

I think, therefore, that the Subordinate Judge came to a correct conclusion in dismissing the Plaintff's suit on the ground that it is not maintainable. The only remedy the Plaintiff has is to apply to the Government under sec. 25 of the Regulation to direct the revision of the record-of-rights. It would appear from the Commissioner's judgment that he decided in favour of Peary Deo on the ground that he was "the principal representative of the descendants" of Barras Deo. The contest before the Commissioner was between Peary on the one hand as the principal descendant of Barras Deo and other members of the family on the other hand. It was nowhere suggested in the

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judgment of the Commissioner that he meant to give Peary Deo as "the principal representative of the descendants" the whole of the 8 annas in Mauza Sankari to the exclusion of other descendants of Barras Deo. However that may be, that will be a matter for the consideration of the Government, if the Plaintiff applies to them to direct the revision of the record under sec. 25. So far as our duties are concerned, all that we can say is that the present suit cannot be maintained in a Civil Court.

The present appeal therefore fails and must be dismissed with costs.

This judgment will also govern Second Appeal No. 201 of 1912, which will also be dismissed with costs.

RICHARDSON, J.—I agree for the reasons indicated by my learned brother. The Plaintiff cannot succeed in this suit without re-opening the record-of-rights. Under the provisions of the Regulation, therefore, the Civil Courts have no jurisdiction to give him the relief for which he seeks.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM ORDER
No. 287 OF 1913.

	SUKHIA BEWA,
D. CHATTERJEE, J.	Opposite Party,
MULLICK, J.	Appellant,
1914,	v.
Heard, 24 and	SECRETARY OF
30, November.	STATE FOR INDIA
Judgment,	IN COUNCIL,
11, December.	Applicant,
	Respondent.

Succession Certificate Act (VII of 1889), secs. 18, 27—Certificate granted by specially empowered Subordinate Judge, if may be revoked by District Judge otherwise than in appeal—Reg. V of 1799, jurisdiction under, nature of

The fact that no appeal has been preferred against an order of a Subordinate Judge (who has been invested with the powers of a District Court under the Succession Certificate Act) granting a certificate, is no bar to its revocation at any time when the circumstances enumerated in sec. 18 of the Act are proved.

The revocation must in such a case be ordinarily made by the Subordinate Judge when he is still exercising that jurisdiction in the district. The District Judge has in such circumstances no jurisdiction to make the revocation except where the case having been instituted and being pending before the Subordinate Judge has been withdrawn by the District Judge.

The jurisdiction of the District Judge under Reg. V of 1799 is more administrative than judicial. He can act thereunder only when there is no claimant, and acting under that Regulation, he is bound to respect the order granting a certificate until the same was revoked by a competent authority.

This was an appeal preferred on the 20th June 1913 against an order of Mr. H. P Duval, District Judge of 24-Parganas, dated the 26th May 1913.

The facts of the case will sufficiently appear from the judgment.

Babu Harendra Kumar Sarbadhikary for the Appellant.

Babu Ram Charan Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows : —

D. CHATTERJEE, J.—One Dhyan Singh, an ex-convict from Andamans, having died intestate, an application for a succession certificate was made by a minor, named Pandu Singh, through his mother Sukhia Bewa, on the allegation that the said Sukhia Bewa was the widow and the said Pandu Singh was the son of the said

deceased. A certificate was granted by the 1st Subordinate Judge of Alipore acting as a Court invested with the powers of a District Court under the Certificate Act. The Collector of Alipore was informed that the claimants were not the legal representatives of the deceased and that the certificate had been obtained by a fraud on the Court. On this information the Collector made some enquiry and then applied to the District Judge for taking proceedings under Reg. V of 1799 and this case was numbered as Intestate case No. 12 of 1913. In this case the learned Judge issued a notice upon Sukhia Bewa to show cause why the succession certificate should not be cancelled, and after taking evidence revoked the certificate and ordered the issue of notice for claimants. Having passed this order in Intestate case No. 12 of 1913, the learned Judge recorded an order of revocation in the certificate case No. 51 of 1912 in the Court of the 1st Subordinate Judge of Alipore. And it is this order of revocation that is appealed against.

It is contended that the order of the learned Judge is incompetent. Sec. 26 of the Succession Certificate Act, VII of 1889, empowers the Local Government to invest Courts inferior to that of the District Judge with the powers of a District Court under the Act and declares that Courts so invested would have concurrent jurisdiction with the District Court in the exercise of all the powers conferred by the Act on District Courts provided that an appeal from such inferior Court would lie to the District Court.

In this case the certificate was granted by the Subordinate Judge of Alipore and an appeal lay to the District Judge. As no appeal had been made, the order granting the certificate was final. Sec. 18 however provides for the revocation of certificates granted under the Act for certain causes. This revocation can be made at any time when the circumstances enumerated in the section are proved irrespective of the finality of the grant by reason of no appeal having been filed against the same. But who is to make the revocation in a case where the grant is by an inferior Court? The Appellant contends that the revocation can be made only by the Court which made the grant. Sec. 18 does not make any specification in this matter. It is true that cl. (2) mentions the concealment of a material fact from the Court as a reason for revocation and the Trial Judge would perhaps be in a better position to judge about such concealment, but that by itself does not seem to exclude the jurisdiction of a Court of concurrent jurisdiction. Sec. 27 provides for the surrender of a revoked certificate to the Court which granted it. This seems to indicate that ordinarily the revocation must be made by the Court which granted the certificate; this however must be so only when the Court granting the certificate is still exercising jurisdiction in the District. In this case the 1st Subordinate Judge of Alipore is still invested with the powers of a District Court in certificate cases and the learned Judge had no jurisdiction to make the revocation. It is true that he could withdraw the case to his own Court under sub-sec. (4) of sec. 26, but that power could be exercised only when the case was pending decision. The learned Judge has made a further mistake in making the revocation in the Intestate case: his jurisdiction under the Regulation is of a limited character and is more administrative than judicial. He can act thereunder only if there is no claimant; in the present case, the Appellant was a rightful claimant under the certificate and the learned Judge was bound to respect the same until it was re-

voked by a competent authority. It has been said that this is a mere irregularity not affecting the merits of the case and we should not therefore interfere. I have held, however, that there was no jurisdiction and in the face of that finding this argument cannot be of any avail. The order of revocation therefore must be set aside with costs two gold mohurs.

MULLICK, J.—I agree.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1376 OF 1913.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
18, March.

JATINDRA MOHAN RAI CHAUDHURI, Judgment-debtor, Petitioner,
v.
BROJENDRA KUMAR DATTA MUNSHI and ors., Decree-holders, Opposite Party.

Indian Limitation Act (IX of 1908), sec 18—Conditions to be fulfilled before invoking section—Application for setting aside sale on the ground of fraud—Fraud subsequent to sale if necessary to be established.

Sec. 18 of the Limitation Act provides that where a person having a right to make an application has by means of fraud been kept from the knowledge of such right or of the title on which it is founded, the time limited for making the application against the person guilty of the fraud or accessory thereto shall be computed from the time when the fraud first became known to the person injuriously affected thereby. Consequently whoever desires to avail himself of sec. 18 has to establish in the first place that there has been fraud; and in the second place that by means of this fraud he has been kept from the knowledge of his right to make an application, but it is not essential to prove that there has been fraud subsequent to the date of sale.

This was a Rule against an order of Babu Jogindra Nath Bose, Subordinate Judge, Khulna, dated 2nd August 1913, reversing that of Babu Sarada Prosad Dutt, Munsif, Bagerhat, dated 11th December 1912.

The facts of the case appear sufficiently from the judgment.

Babus Narendra Chandra Bose and *Satyendra Nath Mitter* for the Petitioner.

Babus Sarat Chandra Roy Chaudhury and *Surendra Nath Das Gupta* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

We are invited in this Rule to set aside an order by which the Court of appeal below, in reversal of the decision of the Court of first instance, has dismissed an application to set aside an execution sale. The facts have not been investigated by the Subordinate Judge, but he has held that as there is no allegation or proof of fraud subsequent to the sale, the application is clearly barred by limitation. We must, consequently, for the purpose of this Rule, assume that the facts as alleged by the judgment-debtors-Petitioners have been established.

On the 11th August 1908, the landlords obtained an *ex parte* decree for rent against the tenants. On the 6th May 1909, they applied for execution of this decree. The sale took place on the 23rd June 1909, and, it is alleged that the decree-holders purchased the property in the name of one Armanullah. It also appears from an examination of the record, although no reference has been made to this circumstance in the judgment of either of the Courts below, or in the course of the arguments addressed to us, that on the 26th September 1909, the decree-holders obtained delivery of possession through the Court; but it may be a matter for determination hereafter whether this represents a genuine

delivery of possession. On the 28th May 1912, the judgment-debtors applied to have the sale set aside, on the ground that the decree-holders had fraudulently brought about the sale of their property and had purchased it for a very small sum, and that they had discovered the fraud only so recently as the 11th May 1912. Their allegations are that the property comprised 40 bighas of land worth at least Rs. 1,000, that the decree-holders deliberately described the property as 10 bighas and valued it for the purpose of the sale proclamation at Rs. 40 and that, in collusion with the peon, they suppressed all notices and induced him to file a false return in Court with the result that at the sale there was no independent bidder present. An examination of the bid-sheet shows that there was an apparent contest between the decree-holders and Armanullah and that the property was ultimately knocked down for Rs. 100 to the latter person. The entire proceedings make it fairly clear, however, that the property was purchased by the decree-holders themselves. Armanullah has not entered appearance at any stage to support the sale impeached by the judgment-debtors and in this Court it was conceded that the decree-holders had in reality purchased the property in the name of Armanullah. The Court of first instance found that the property comprised 40 bighas of land, worth at least Rs. 400, and that the decree-holders had managed to secure it for Rs. 100 only, without any rival bidders, as the sale proclamation had not been published. But the Court did not determine the question of limitation. Under Art. 166 of the Second Schedule to the Limitation Act, an application for reversal of the sale is required to be presented within 30 days of the date of sale and as the application in this case was presented long after the expiry of the period prescribed, the judgment-debtors could succeed only if they brought this case within the terms of sec. 18 of the Indian Limitation Act. The Court of first instance however without an adjudication upon the questions of fraud and limitation set aside the sale. Upon appeal, the Subordinate Judge has reversed that decision on the ground of limitation, without an investigation of the facts.

We have been invited to set aside this decision on the ground that the judgment of the Subordinate Judge is materially defective inasmuch as he has not determined any of the essential matters in controversy between the parties. On behalf of the decree-holders, an earnest endeavour has been made to support the decision of the Subordinate Judge on the ground that as no fraud has been alleged or proved subsequent to the date of sale, the judgment-debtors are not entitled to the benefit of sec. 18. In support of this view, reliance has been placed principally upon the decision in *Purna Chandra Mandal* v. *Anukul Biswas* (1) and *Raikishori Dassya* v. *Mukund Lal Dutt* (2) and to a subordinate extent upon the decision in *Tookomoni Dasi* v. *Dwarka Nath Dinda* (3). In so far as the case of *Purna Chandra Mandal* v. *Anukul Ch. Biswas* (1) is concerned, there is no doubt a *dictum* in the judgment to the effect that the question of limitation depends upon what has taken place after the date of the sale. But as was observed in the case of *Narayan Sahu* v. *Damodar Das* (4) this passage is capable of a meaning to which no exception can be taken. To determine the applicability of sec. 18 of the Limitation Act to the circumstances of a particular case, the Court

(1) I. L. R. 36 Cal. 654 (1909).
(2) 15 C. W. N. 965 (1911).
(3) 16 C. L. J. 581 (1912).
(4) 16 C. W. N. 594 (1912)

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must determine whether the person aggrieved by the alleged fraud has been as a matter of fact kept out of knowledge of his right to have relief by reason of the fraud. If it is proved that subsequent to the sale, he was as a matter of fact aware of the sale, notwithstanding the fraud, he is clearly not entitled to the benefit of sec. 18, because in spite of the fraud he has not been kept out of the knowledge of his right to have relief on the ground of fraud. On the other hand if the cases of *Purna Chandra Mandal* v. *Anukul Biswas* (1) and *Raikishori Dassya* v. *Mukund Lal Dutt* (2) were intended to lay down the broad proposition that to entitle a person to avail himself of the provisions of sec. 18, he is bound to allege and prove fraud subsequent to the date of the sale, the view is as pointed out in the case of *Raikishori Dassya* v. *Mukund Lal Dutt* (2) contrary to the decision of their Lordships of the Judicial Committee in *Rahimbhoy Habibhoy* v. *Turner* (5). In this case, Lord Hobhouse observed that when a man has committed a fraud and has got property thereby, it is for him to show that the person injured by his fraud and seeking to recover the property had had clear and definite knowledge of those facts which constitute fraud, at a time which is too remote to allow him to bring the suit. The terms of sec. 18 of the Indian Limitation Act are perfectly plain and there is no real difficulty in its application. The section provides that, where a person having a right to make an application has by means of fraud been kept from the knowledge of such right or of the title on which it is founded, the time limited for making the application against the person guilty of the fraud or accessory thereto shall be computed from the time when the fraud first became known to the person injuriously affected thereby. Consequently whoever desires to avail himself of sec. 18, has to establish, in the first place, that there has been fraud; and, in the second place, that by means of this fraud, he has been kept from the knowledge of his right to make an application. In the case before us, the judgment-debtor alleges that the decree-holders, fraudulently and in collusion with the officers of the Court, caused suppression of the notices with the result that they were not apprised of the sale as they would otherwise have been in due course, in other words, by means of fraud they were kept from the knowledge of the sale. Their right to have the sale set aside accrued the very moment the sale took place. If they were, by means of fraud, kept from the knowledge of the sale, they were necessarily kept from the knowledge of their right to have the sale set aside. No doubt, the decree-holders may possibly establish that in spite of the alleged fraudulent suppression of the processes, the judgment-debtors were aware of the sale and consequently of their right to have the sale vacated. But if it is established that by means of fraud the judgment-debtors were kept in ignorance of the fact of sale of their property, it is difficult to appreciate how the position can be maintained that they have not been kept from the knowledge of their right to have the sale set aside on the ground of fraud. We are consequently of opinion that upon a plain reading of sec. 18, it is not essential to prove that there has been fraud subsequent to the date of sale. Reliance has, however, been placed upon the decision of *Tookomoni Dasi* v. *Dwarka Nath Dinda* (3), which is of no real assistance to the

(1) I. L. R. 36 Cal. 654 (1909).
(2) 16 C. W. N 965 (1911).
(5) L. R. 20 I. A 1: s. c. I. L. R. 17 Bom. 341 at p. 347 (1892).
(3) 16 C. L. J. 581 (1912).

decree-holders. In that case, the judgment-debtors alleged that there was fraud on the part of the execution-purchasers after the sale. In proof of such alleged fraud, they relied upon evidence of fraud antecedent to the sale, which the Court below declined to examine. It was in these circumstances that this Court ruled that to determine whether there has been fraud subsequent to the sale, evidence of fraud antecedent to the sale may be very material, because the fraud subsequent may be a continuation of the fraud antecedent, uninterrupted by the sale. We are clearly of opinion that the view taken by the Subordinate Judge cannot be supported and we may add that it is fairly clear that the true bearing of sec. 18 has not been correctly appreciated by either of the Courts below.

The result is that this Rule is made absolute, the decision of the Subordinate Judge set aside and the case remanded to the Court of first instance for re-trial. We are informed that the decree-holders had no opportunity to adduce evidence in that Court. Each party will be at liberty to adduce fresh evidence in support of his case. The Court will first determine, whether fraud has been established as alleged by the judgment-debtors. If fraud is proved, the Court will proceed to determine whether the judgment-debtors had been kept out of the knowledge of their right to have the sale set aside by means of such fraud. The Petitioners are entitled to their costs both here and in the Court of the Subordinate Judge. We assess the hearing fee in this Court at two gold mohurs.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

REF. No. 36 AND APP. No. 983 OF 1914.

FLETCHER, J.
BEACHCROFT, J.
1915,
14, January.

THE KING-EMPEROR
v.
MOHAR ALI SHEIKH,
Accused.

Indian Penal Code (Act XLV of 1860), sec. 302—Criminal Procedure Code (Act V o 1898), secs. 374, 376—Accused charged with murder—Duty of presiding Judge as to arranging for his defence—Re-trial on the same charge.

The accused who was undefended in the Sessions Court was convicted under sec. 302, I. P. C. The case came up to the High Court for confirmation of the sentence of death under sec. 374, Cr. P. C., and also on appeal.

Held—*That accused persons charged with murder should not go undefended.*

The respective duties of the Judge and the Bar as to the defence of such accused persons pointed out.

The High Court held that on the evidence as it stood the sentence of death could not be confirmed and directed, under sec. 376, cl. (b), *a re-trial of the accused on the same charge after arrangement being made for his defence.*

This was a reference under sec. 374, Cr. P. C., by C. H. Moseley, Esq., Additional Sessions Judge of Mymensingh, for confirmation of the sentence of death passed upon the accused under sec. 302, I. P. C., in the above case. There was also an appeal preferred by the accused against the sentence.

Babu Bir Bhusan Dutt for the Accused.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This case comes before us on a reference made by the learned Additional Sessions Judge of Mymensingh under the provisions

THE KING-EMPEROR *v.* MOHAR ALI SHEIKH.

of sec. 374, Cr. P. C., and also on appeal by the accused. The accused was tried before the learned Additional Sessions Judge with the aid of a jury on two charges : first of all, with having murdered one Jamir Sheikh, and, secondly, with voluntarily causing hurt by a cutting instrument to one Kocha. The present case is one that has caused us considerable anxiety, because the accused was undefended before the learned Sessions Judge. That is a course which ought not to be adopted in cases where the accused is tried on a capital charge. There has been a practice long established and well recognised that when an accused appears before the Judge on a capital charge, the Judge is accustomed to request a member of the Bar who practises before him to undertake the defence of the accused. That obligation has, so far as I am aware, always been recognised by the profession who always have willingly undertaken the defence of the accused so charged at the request of the presiding Judge. However, the learned Judge in the present case did not appoint or request any member of the profession to conduct the defence of the accused, the result being that the case has been tried practically *ex parte* and the difficulties that appear on the evidence have not been cleared up in the course of the cross-examination either by the accused himself or by the learned Judge. The evidence as it stands on the record is such that we are unable to confirm the sentence passed on the accused. What the points of difficulty transparent to any person who has any knowledge of the value of evidence are, it is not our duty to state at present nor do we think it right that at the present moment we shall enumerate which are the points that have pressed upon us. The only question is what ought we to do in the present circumstances. If the story relied upon by the prosecution be true, an exceedingly cruel murder has been perpetrated and public safety requires that, if possible, the person who has perpetrated that murder should be brought to justice. Sec. 376, cl. (*b*), Cr. P. C., gives us jurisdiction to order a new trial on the same or an amended charge. That being so, we consider that, in this case, we are bound to send the case back to the learned Judge with a direction that the accused be re-tried on the same charges that have already been framed against him and we would request the learned Judge to see that, in the new trial, some gentleman represents the accused before him. We, therefore, decline to confirm the sentence of death passed on the accused and send the case back to the learned Judge for the accused being re-tried.

Re-trial ordered.

[CRIMINAL REVISIONAL JURISDICTION]

REV. NOS. 1863 AND 1902 OF 1914.

FLETCHER, J.	
BEACHCROFT, J.	CHATTRADHARI MIAN and
1915,	another, Petitioners,
Heard,	*v.*
27, January.	THE KING-EMPEROR,
Judgment,	Opposite Party.
5, February.	

Criminal Procedure Code (Act V of 1898), sec. 234—Section if applies to offences against different persons.

Sec. 234, Cr. P. C., is not limited to cases where the offences have been committed against the same person. It applies where the complainants are different persons.

Per FLETCHER, J.—*The power given by sec. 234 is however one that requires to be used with great care and caution when there are different complainants.*

This was a Rule against an order of the Deputy Magistrate of Naogaon, dated

CHATTRADHARI MIAN v. THE KING-EMPEROR.

6th August 1914, convicting the Petitioners under sec. 420, I. P. C.

The facts will appear from the judgment of the Trying Magistrate which is set out below :—

"Two charges of identically the same offence are brought against the accused. Both were committed on the same date, 27th September, in Bethia *Melâ*.

"The first Complainant Saudagar states that he came to the *melâ* with Rs. 65 to purchase bullocks. Accused got into conversation with him, and pointed out a very fine bullock which he said he wanted to buy. He had bid Rs. 51, but the owner would not part with it. He asked Saudagar to bid for him, and gave him Re. 1 as earnest money. Saudagar complied, but being a simple person he pointed out that the bullock was not worth more than Rs. 32, but accused said he had taken a particular fancy to it.

"Saudagar completed the purchase and paid the earnest money. He fixed the price of Rs. 50, but when accused began to produce the money, the owner said, he would not deal with him, as they had just quarrelled. Accused therefore prevailed on Saudagar to pay down Rs. 49 for the bullock, and to bring the bullock along with him to accused's *dera*. The transaction was completed, though it may be noted that the seller did not test his money before going off. Accused and Saudagar then went along together, when accused made a sudden dive to escape. Saudagar however seized and held him, and made an outcry which attracted the attention of a constable who arrested accused.

"This outcry also brought up the other Complainant Mahadeo, who recognised accused as the man who had victimised him in a precisely similar fashion shortly before. In his case the same previous conversation had taken place, and he had been induced to purchase for accused a bullock worth only Rs. 22 for Rs. 44. In his case, however, accused had succeeded in evading him, and left him with the bullock on his hands.

"There is no evidence to corroborate Saudagar except that he was found holding on to accused with a bullock in his possession and told the same story then as now. Mahadeo is corroborated by two witnesses of his own village, who saw the first part of the transaction, but not the finish. These men were brought to identify accused before the Deputy Magistrate. Elaborate precautions were taken by accused's muktear, but both witnesses successfully identified accused.

"After hearing the witnesses and watching their demeanour, I am absolutely convinced of their *bonâ fides* and believe their story to be perfectly true.

"I find accused guilty of both offences of which he is charged as detailed in the charge-sheet. Rs. 29 has been found on the person of the accused. I therefore fine him Rs. 15 and sentence him to one year's rigorous imprisonment under sec. 420 on the charge of cheating Saudagar—the fine to be paid to Saudagar as compensation.

"On the charge of cheating Mahadeo, I sentence accused to one year's rigorous imprisonment and a fine of Rs. 14 to be paid as compensation to Mahadeo. The two sentences of imprisonment will run consecutively."

Dr. Dwarka Nath Mitter, Babus Baikuntha Nath Mitter and *Manindra Nath Banerjee* for the Petitioners.

Babu Krishna Kamal Moitra for the Complainant in No. 1902.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—The only question raised

in the hearing of these two Rules is whether sec. 234 of the Code of Criminal Procedure authorises one trial of not more than three offences of the same kind committed within the space of 12 months when the offences have been committed against different persons. The judicial decisions on this question are not uniform. In the case of *Queen-Empress* v. *Murari* (1), it was laid down by the Court that "the combination of three offences of the same kind for the purpose of one trial can only be where they have been committed in respect of one and the same person and not against different prosecutors". A different view was taken by this Court in the case of *Manu* v. *Empress* (2). The case of *Queen-Empress* v. *Juala Proshad* (3), the next authority in order of date, is not opposed to the decision in *Queen-Empress* v. *Murari* (1), for in the case of *Queen-Empress* v. *Juala Proshad* (3) the several sums that had been embezzled had become the property of the Government and there was, therefore, only one complaint. The next case is *Nunda* v. *Emperor* (4) to which decision I was a party. In that case, a similar view was taken to that expressed in the case of *Queen-Empress* v. *Murari* (1). That decision was followed in the case of *Ali Mahomed* v. *Empress* (5), but dissented from in the case of *Bhagwan* v. *Emperor* (6).

On a further consideration, I am of opinion that the decision in the case of *Nunda* v. *Emperor* (4) cannot be supported. No doubt, sec. 234 of the Code of Criminal Procedure is taken from sec. 5 of the Statute 24 and 25 Vict., c. 96. The words "against the same person" which appear in sec. 5 of 24 and 25 Vict., c. 96. do not appear in sec. 234 of the Code of Criminal Procedure.

Sec. 234 of the Code of Criminal Procedure, I think, is not limited to cases where the offences have been committed against the same person.

At the same time, I think that the power given by sec. 234 is one that requires to be used with great care and caution, where there are different Complainants.

In the result, I think these two Rules ought to be discharged.

BEACHCROFT, J.—The only question which arises in these two Rules is whether sec. 234, Cr. P. C., is limited to a case where there is one Complainant in respect of all the offences charged or whether it applies where the Complainants are different persons.

Looking to the plain words of sec. 234, I should hardly have thought the matter open to argument. Sec. 234 is one of the exceptions to the general rule contained in sec. 233, *viz.*, that every charge is to be tried separately. It provides that three charges of the same offence committed in the course of 12 months may be tried together, and the second part of the section explains what is meant by the same offence. Had the legislature thought fit to impose such a limitation as that contended for on behalf of the Petitioner it would presumably have done so expressly, whereas the section is framed in the widest terms, and when the legislature has imposed no limitation, it is not for us to do so.

But there are cases in which the view has been taken that the limitation contended for applies. It is not necessary to discuss the case of *Queen-Empress* v. *Murari* (1) to which reference was made in the Full Bench case of *Queen-Empress* v.

(1) I. L. R. 4 All. 147 (1881).
(2) I. L. R. 9 Cal. 371 (1882).
(3) I. L. R. 7 All. 174 (1884).
(4) 11 C. W. N. 1128 (1907).
(5) 13 C. W. N. 418 (1908).
(6) 13 C. W. N. 507 (1908).

(1) I. L. R. 4 All. 147 (1881).

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Juala Proshad (3), from the report of which there is reason to suppose that one of the Judges who decided the earlier case had changed his views. But in the case of *Nunda* v. *Emperor* (4), the opinion was expressed that sec. 234 "evidently refers to different acts done by the same individuals or same sets of individuals against the same Complainant". In that case the earlier case of *Manu* v. *Empress* (2) does not seem to have been brought to the notice of the learned Judges. The decision in that case was directly contrary to the view contended for on behalf of the Petitioner. The legislature in the Code of 1882 endorsed the view taken by the learned Judges by introducing an explanation of what is to be understood by the phrase "offences of the same kind" and that explanation is repeated in the present Code.

Three classes of cases constantly occur in the Mofussil in which an accused is charged with offences of the same kind against different Complainants. In one a man breaks into several houses in one night: in another a man whose house is searched for stolen property is found to have received property stolen from different persons on different occasions; in a third a man cheats several persons in pursuance of a system, *e.g.*, by pretending to have the power of doubling money. In the last-mentioned case, the joint trial might perhaps be defended on the ground that the offences were committed in the course of one transaction, without having recourse to sec. 234, but in the other cases the offences are not committed in the course of the same transaction. In these cases where there is no fear of the accused being prejudiced, the charges are always tried together. In the whole of my experience as Magistrate and Sessions Judge, I do not remember objection ever having been raised to the accused being tried at one trial for three offences in such cases. Such an objection would have struck me with surprise as I am sure it would almost all judicial officers in the Mofussil, who have constantly to try cases in which the provisions of this section are applicable, especially when the view, described in that judgment as evident, had been definitely rejected by two Judges of this Court so far back as 1882.

It may be that the decision arrived at in *Nunda* v. *Emperor* (4) was correct in that there were three charges of rioting and three of hurt, and that such a case would not be covered by sec. 234. But so far as that case decided that sec. 234 applies only to offences against the same Complainant, I must express my dissent from it.

It is argued that unless the section is limited in the way suggested, an accused might be much embarrassed by the [illegible] of charges, *e.g.*, a [illegible] tried at one trial on three charges of murder committed on different occasions. Such an argument entirely loses sight of the fact that it must be presumed that those who are selected for the administration of the criminal law are fit for their duties, and will not use their powers in an arbitrary and oppressive manner. The Criminal Courts must be credited with the possession of a little common sense.

Finally it was argued that other sections of the Code would be found difficult to work, if the unrestricted interpretation were placed on sec. 234. The only section referred to was sec. 247. It was suggested that if one of three Complainants were absent, the accused would be acquitted of

(2) I. L. R. 9 Cal. 371 (1882).
(3) I. L. R. 7 All. 174 (1884).
(4) 11 C. W. N. 1128 (1907).

(4) 11 C. W. N. 1128 (1907).

THE

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Contents.

NOTES

dge's views on the Administration of Justice.

a recent issue of the Canadian Law Times, the heading The Administration of ice, appears an address delivered before Illinois State Bar Association at Chicago the Hon'ble William Renwick Riddell, D, LL D, a Judge of the Ontario Court Appeal There are in this address some very king observations concerning the functions the Court and of the Bar as he conceives them be His Lordship's language, it will be served, is lacking neither in force nor in ectness, and though one may not be disposed agree with everything his Lordship says, or h the manner in which it has been said, all vigorous plain speaking is so obviously inct with high purpose and sound judgment they ought not to be missed in any place re a similar system of judicial administration vails

e Court and Public Sentiment.

On this subject his Lordship's opinion appears be at places somewhat self-contradictory this inconsistency is but the outward expression of a conflict which is constantly waged in the breast of every conscientious Judge who has to administer justice according to law ".

It is not enough, he says, " that the Court shall give litigants their rights according to law The Court was invented to prevent strife by determination of right by and through a just and impartial referee and unless it is believed that the Court is just and impartial, it fails in a most important part of its object and loses much of its value Nay, I am not at all sure that it is not sometimes more important that the litigants and the community shall think justice is being done than that the decision shall be strictly in accord with precedent

Precedents.

From the above passage it is fairly clear that precedents do not occupy a very high place in his Lordship's estimation But his Lordship obviously did not wish to leave the matter in doubt when he went on to add

' Outside of the fundamental principles of honesty, there is nothing either good or bad in law but thinking makes it so, most of our admiration for the sages of the law, Bracton, Littleton, Coke is as well founded as admiration of the middle age schoolmen and no more so Extraordinary ability profound learning, consummate subtlety characterize both classes, but no one would be much the worse if they devoted their attention to heraldry or the tracing of pedigrees, or if in eight out of ten cases they found the law diametrically opposite to what they did find " ' Howbeit he goes on to add for good or for ill, the law is in most instances settled either by binding decision or by legislative authority People are entitled to the law as it stands and must submit to it, whether they like it or not It the people do not like the law, let them change it the Court cannot change it for them

Duty of deference to just public sentiment.

' God forbid, he says in another passage, ' that any Court should be influenced in its judgment by the opinions of the litigants or of any other person whatsoever . But that does not imply that the Court should so act as to give rise to the impression among the people that it is wholly indifferent to a just public sentiment ". Elsewhere " It is never

to be forgotten that the Courts belong to the people and the wishes--even the prejudices—of the people must be borne in mind".

"Independent of public opinion, every Judge must be, but that is not synonymous with indifference to the manner in which the public receive his judgments and the opinion the people have of his honesty. Like Lord Mansfield, while he should despise the popularity that is run after, he may well prize that which follows. He is called upon for imperative public reasons to avoid the very appearance of evil and see to it that nothing in the manner of his judgments is unnecessarily offensive to his fellow-countrymen, however unpalatable the matter may be That Judge received no commendation who, while he feared not God, neither regarded he man; and no Judge may use the objurgation, so well known as attributed to a multi-millionaire, "the pubiic be damned."

"The position of a Judge is one of the very highest to which a man can be called in a free country; the influence for good of an upright and conscientious Judge is incalculable; and when he exhibits defects of manner, lack of prudence and contempt of the commonalty, he grieves the judicious and does as much or nearly as much harm as if he were ignorant of law, indifferent to the soundness of his decision, partial in his treatment of the Bar or litigants and subservient to sinister interests."

Court, servant of the people.

"The Court", says his Lordship, "is not (at least in my country) the master of the people, but their servant, supported by them for their own use and in their service; the Judge is paid by the people to do their work, and just as soon as the Court is not worth, directly or indirectly, what it costs, it should be abolished". "A Court does not exist for itself; it is not an end in itself". "The Court was made for man, not man for the Court. No considerations of the dignity, tradition, *esprit du corps* should ever induce a Judge to forget that he is a servant of the people, paid by the people to do the people's work, -if he fails to appreciate this elementary truth and to act upon it, he is apt to be an unfaithful servant, a dishonest recipient of wages paid for work which he fails to do".

Court's dignity.

"The Court", he says, "does not exist for the exhibition of the personal dignity of the Judge. Personal dignity in a Judge may be a valuable asset to the community which he serves, it may help to preserve decorum and thereby advance public business, but it may be a detriment if of a certain kind. . . . The dignity which is so concerned with looking for slights and "contempts of court" that it has little time for a[ny]thing else, is better placed elsewhere than the Bench. Let a Judge do his work faithfu[lly,] promptly and courteously, and his dignity [will] generally be left to look after itself."

Court's duty when lawyer at fault.

The force of the following observa[tions] coming from a Judge of over thirty years [ex]perience can hardly be overrated:

"Whenever, by any hide-bound practic[e a] Court cannot do justice on the facts beca[use a] lawyer has made a mistake, there is a failure [of] elementary duty of the Court. In an ideal [court] every liberty will be given to both parti[es to] bring out all the relevant facts, and judgmen[t will] be given on those facts according to the very [right] and justice of the case, even if the lawyers [make] fifty mistakes and a hundred omissions."

"Law," his Lordship trenchantly adds [is] not a game where the smartest man wins [but] a serious attempt to determine rights, no m[atter] by whose mouth or with what ingenuity [or] want of it—they are asked."

The "good lawyer".

The following remarks on what are the [pro]per functions of the Bar and what are not [are] not the less just because expressed in some[what] uncompromising language:

"The good lawyer of popular concept[ion is] no great acquisition to the community any[way] . . . A well-educated Bar is a great [desi]deratum a self-respecting Bar is of great [value] a Bar, which never forgetting the rig[hts of] the client, does not think it inconsistent [with] duty to assist Justice by courtesy to oppo[nents,] by civility to witnesses and others by re[spect] to the Court, by a due regard to the exig[encies] of public business. The noisy, showy barr[ister] who plays to the gallery, seeks to impres[s his] client or the populace with his ability [and] importance by discourtesy to others, inso[lence] (more or less veiled) to the Court, intermi[nable] oratory to the jury, is an evil, a public nuis[ance.] This class will always be met with where [the] people want it".

The "learned" lawyer.

His Lordship is, without doubt, less se[vere] on the merely "learned" lawyer, but he m[akes] it plain that the Commonwealth can very [well] do without him:

"Law is a liberal and a learned profession [and] there are very few fields of knowledge w[hich] may not be of advantage in enlarging the [mind] and understanding. Even deep reading in

er authors will do no great harm, if care be en not to fill the mind with antique views the detriment of common sense. . . . fact that law is a learned profession does diminish the significance of the fact that the er is a business man, hired to do his client's ess."

"learned" Judge.

his Lordship could not spare the "learned" in the Bar, it was only to be expected that uld not spare the "learned" man on the .

here is", says his Lordship, "one failing which Courts of Appeal are very frequently ed; they are apt to forget that the main of litigation is the determination of the of the litigants before them and to ne that what they are for is to write dis- ons on the law. To a lawyer, there is ronger temptation than to follow up a point sted in a case and to exhaust the law on point, although it is not really material in se under consideration. There can be no ion to that course but it should not be ed so as to delay a decision unduly and ly deprive the litigant of his right to y justice."

e forbids our making further quotations he address. But those given above will, l, furnish sufficient materials for sober ng to all who take part in the administra- f justice.

JUDGES AND JURIES.

ely and significant, in view of the triumph l by jury as secured by the Defence of the (Amendment) Bill, are some observa- made by the Lord Chief Justice in the of Criminal Appeal on Monday. In the of a discussion as to the direction to a jury criminal trial, he said: -

as often been suggested here that a jury t of unintelligent people, who do not know case is about until the Judge tells them in mming up. This Court, ever since its in- n, has expressed the opinion that there is ndation for such a suggestion. The mere hat a Judge does not put a case exactly as sel thinks he should, does not justify us in g to the conclusion that the jury did not stand the case.

ly all Lord Reading's predecessors have notable tributes to trial by jury. His diate predecessor, Lord Alverstone, in his ollections of Bar and Bench", writes: tching juries frequently and very carefully, I have often been struck by the fact that they seem to apply their minds to the real issues of the case, disregarding the particular language in which they have been addressed." Mr. Edward Dicey once remarked to Lord Russel of Killowen, after he had become Lord Chief Justice, that if he were on his trial as an innocent man he would sooner be tried by a Judge than by a jury. "If", was the reply, "you knew as much of Judges as I do, you would change your opinion; juries, as a rule, take a much more common sense view of a case than the Judges". Lord Coleridge recognised in the jury system the popular element in our administration of justice, and attributed to it much of the public satisfaction with the work of the Courts. Sir Alexander Cockburn stated his decided conviction that a jury assisted by a Judge is a far better tribunal for the elucidation of truth than a Judge unassisted by a jury. Here, then, are emphatic expressions of confidence in the capacity and integrity of juries by the last five occupants of the office of Lord Chief Justice. Their words may profitably be borne in mind by the lesser mortals who are accustomed to speak disrespectfully of one of the most ancient and valuable institutions in the land.- The English *Law Journal*, 27th February 1915.

CURRENT INDIAN CASES.

(CRIMINAL.)

Criminal Procedure Code, secs. 349, 528.

EMPEROR *v.* VINAYAK NARAYAN ARTE, I. L. R. 38 Bom. 719

It is only the District Magistrate or the Sub-divisional Magistrate who has jurisdiction to exercise the powers mentioned in para. 2 of sec 349, *i.e.*, pass such judgment, sentence or order in the case as he thinks fit. Such a Magistrate on receipt of a case cannot act under sec. 528 Cr. P. C., which has no application to proceedings submitted under sec. 349.

Criminal Procedure Code, sec. 195—Sanction.

Re NARRAYYA PARAN KUSAM, I. L. R. 37 Mad. 561.

In giving sanction to prosecute for giving false evidence, Courts should not merely see that there is a good prospect of conviction but should also consider whether the circumstances are such as to render a prosecution desirable in the public interests.

Criminal Procedure Code, sec. 488—Maintenance—Child.

A. KRISHNASWAMI AYYAR *v.* CHANDRAVAVANA. I. L. R. 37 Mad. 565.

The word "child" has not been defined in the Criminal Procedure Code and in the absence of any definition or anything contrary in the Act it means a person who has not reached the age of 18.

Indian Penal Code, sec. 363—Kidnapping.

Re MUTHU IBRAHI, I. L. R. 37 Mad. 567.

Under the Mahomedan Law the attainment of puberty determines minority and the mother's right to custody but for the purpose of sec. 363, I. P. C., regard must be had only to the definition of minority in sec. 3, Act IX of 1875.

(CIVIL.)

Civil Procedure Code (Act V of 1908), sec. 60, cl. (2), (h)—Army Act, 1881 (44, 45 Vict., c. 58), sec. 190, sub-sec. (8).

KING-EMPEROR *v.* F. D. DAVIDSON, I. L. R 38 Bom. 667.

Officers of the Indian Staff Corps or the Indian Army are also officers of His Majesty's Regular Forces and the pay of such an officer cannot be attached.

Execution of decree by Collector.

ARJUNA *v.* KRISHNAJI, I. L. R. 38 Bom. 673.

After a decree has been transferred to a Collector, the Court which passed that decree is for the time being *functus officio* for all purposes of execution, but as soon as the Collector has exhausted all the power of execution conferred upon him, any matters requiring to be done must be done by the Court which made the decree.

Agreement after institution of suit to submit matters in difference to arbitration, effect of.

VYANKATESH *v.* RAMCHANDRA, I. L. R. 38 Bom. 687.

The Plaintiff and one of the Defendants after the institution of the suit entered into an agreement to submit the matters in difference between them to arbitration. Thereupon the Defendant moved the Court to stay the further progress of

Review.

THE COLLECTION OF HINDU LAW TEXTS. *Edited by J. R. Gharpure, B. A., LL.B., Nos. 1, 2, 3, 5, 6 and 14. Bombay: The Collection of Hindu Law Texts Office, Angre's Wadi, Girgaon. 1914.*

When, some years ago, Mr. Gharpure announced his scheme of undertaking the publication of all the texts with translations bearing on Hindu Law, we had, we must confess, considerable misgivings as to whether such an ambitious scheme will ever attain fruition—specially as it was part of the editor's plan to carefully compare the various readings of the text extant and to note the variations, and the translations were to be not bare translations but illumined and enriched by scholarly notes. Up to March 1911, when our first notice of the work appeared (15 C. W. N. cxxxv), it had apparently not made very great progress. It is therefore with unfeigned pleasure that we welcome the present volumes which demonstrate that the delay which unavoidably occurred at the outset has been more than made good by the progress made in recent years.

It is also to the credit of the present editor that motives of business rivalry have no place in his enterprise for, a scholarly translation of the *Prayaschittadhyaya* of the *Mitakshara* having in the meanwhile been published from the Panini Office of Allahabad, Mr. Gharpure has expressed his intention not to go over the same ground again. So far as this *Adhyaya* is concerned, he proposes to publish a translation of the Smriti portion only with selected notes from the *Mitakshara* and *Balambhatti*.

Of the volumes issued, the first gives the Text of the Yajnavalkya Smriti with the *Mitakshara*, a detailed list of contents, an index to verses, an index to the names of sages and authors referred to in the book and an index to *Nyayas* and maxims quoted in the volume and lastly an index to the rules of grammar. More, we do not think, could be done to make the original texts accessible to scholars.

The second volume is a translation of the *Vyavahara Adhyaya* of the *Mitakshara* with scholarly annotations at the foot of the pages. The texts of the Smriti and the commentary are kept distinct by differentiation in the types used. Colebrooke's translations and the present translator's departures therefrom are carefully indicated.

The *Subodhini* commentary on the *Vyavahara Adhyaya* of the *Mitakshara* forms the third

volume, whilst the *Balambhatti* commentary on the *Achara* and *Vyavahara Adhyayas* form the fifth and the sixth volumes and the first part of the *Vyavahara Mayukha* forms No. 14.

The printing and the general get-up of all these volumes are highly satisfactory. The prices of Nos. 1, 2, 3, 5 and 6 are respectively Rs. 6, Rs. 12-8, Rs. 2-8, Rs. 10 and Rs. 6—quite moderate considering the labour and expense involved. Amongst other volumes now in preparation the *Manu Smriti* with the gloss of *Medhatithi* and the English translation thereof will be awaited with special interest.

Notes of Cases.

ENGLISH LAW COURTS.

THE PRIZE COURT.—Before THE RIGHT HON'BLE SIR SAMUEL EVANS, President. "*The Mowe.*" 29th October 1914.

Hague Conventions, Nos. VI and XII, Arts. 3 and 4—Right of alien enemy to appear personally or by Counsel before Prize Court—Capture in port, meaning of—Capture at sea, meaning of—Territorial waters and High Sea.

The Mowe, a German sailing vessel, was captured in the Firth of Forth on the 5th August.

The *Attorney-General* with *Dr. Holland, K. C.*, for the Crown contended that the vessel was captured at sea and ought to be condemned. The word "port" in the Hague Convention, No. VI, meant a place where cargoes were loaded or unloaded, and that it had no application to the fiscal limits of the port of Leith. Further he submitted that the Defendant, an alien enemy, was not entitled to be heard or to appear by Counsel before the Court.

He relied on Storey's Prize Court Practice, p. 21, and referred to the judgment of Bailhache, J., in *Robinson* v. *Continental Insurance Company*, 19 C. W. N., p. viii.

Mr. C. R. Dunlop for the Defendant relied on "*The Phœnix*", 2 E. P. C., p. 238, "*The Pedro*", "*The Guido*", "*The Buenos Venturo*", all reported in 175 U. S. Reps., and "*The Panama*", 176 U. S. 535.

The learned Judge in the course of his judgment said as follows :—

As to the right to appear, I have already dealt with it in one of its aspects in the *Marie Glaeser* (1914, P., at pages 221—223). In that case an appearance in the proceedings was entered for the enemy owners, but at the hearing no one came forward to represent them. It was obvious that no ground could be shown either under The Hague Convention or otherwise against the ship's capture and condemnation; and I ordered the appearance to be struck out. In the case now before the Court it is contended that the claimant is entitled under the Convention to appear to resist condemnation of his vessel, and to secure that the vessel is subjected only to a decree of detention without compensation during the war, or requisition on making compensation. I will assume that The Hague Convention referred to is in force and applicable. I referred in the *Marie Glaeser* to some decisions of Lord Stowell and Dr. Lushington, and I will not repeat them. There are other decisions to the like effect: *e.g.*, in the *Falcon* (6 Ch. Rob.).

The principle on which the Prize Court in the times of Lord Stowell and Dr. Lushington proceeded was that no one who was a subject of the enemy could be a claimant, unless in particular circumstances that *pro hac vice* discharged him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*. Otherwise such a person was regarded as totally *ex lege*.

In his argument the Attorney-General submitted two propositions as embodying the result of the authorities in this Court, namely :—

(1) Where an owner avowed his enemy character without qualification he was not a *persona standi in judicio*, and was not a person who had a right to be heard; and

(2) Where a person avowed that he was a subject of the enemy State in general, but had ground for urging that *pro hac vice* he stood in a position which relieved him from the pure enemy character, he was entitled to appear and to be heard; and that the real question was under which of these two rules a German owner should be regarded when he came before the Court.

In my opinion, that submission is well founded and accurate.

Reference was made in argument to cases in the American Courts arising during the Spanish-American War in 1898. On examination it will be found that in almost all the cases where enemy claimants were heard at that time their claims arose in circumstances very similar to those in the class of proceedings which came before the British Prize Court during the Crimean War. But the authorities cited fall short of showing that in the United States any

claimant who avowed an enemy character has been allowed generally to appear in their Courts.

In argument before me *Mr. Dunlop* also compendiously referred to cases which were heard during the Russo-Japanese War in 1904-5 and reported in the "Russian and Japanese Prize Cases," Vol. I, page 182; and Vol. II, pages 1, 12, 39, 46, 52, 92, 95, 116 and 354.

He dealt with these cases, because reliance was placed upon the liberty which was alleged to be given by the Russian and Japanese Prize Courts to enemy claimants as adding force to the right asserted on behalf of enemy owners in this Court. In each of the cases, however, complete immunity was claimed. All the cases were, of course, before The Hague Conventions of 1907. Under the Convention (No. VI) the attitude which the owner in the present case must take might shortly be stated in these terms:—"I admit that I am an alien enemy; and therefore that my ship was lawfully captured, or seized, as being enemy property; but I wish to appear to put forward and argue my claim that in the circumstances of my case the ship is not confiscable, and cannot be condemned; but can only be detained during the war, to be restored to me after the war." Applying the principles laid down by Lord Stowell and Dr. Lushington, his Lordship was satisfied that they would not have allowed the enemy owner to appear to assert such a claim. There was here no coming *pro hac vice* within the King's peace; but there was here no suspension of the hostile character.

I will now consider whether the owners of an enemy vessel have a right, or should be given the right, to appear to put forward a claim under the Conventions, assuming, as was done during the argument, that they are operative. Dealing with The Hague Conventions as a whole, the Court is faced with the problem of deciding whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise. Mr. Holland argued that this is a matter not of international law, but of the practice of this Court. That view is correct. I think that this Court has the inherent power of regulating and prescribing its own practice, unless fettered by enactment. Lord Stowell from time to time made rules of practice, and his power to do so was not questioned. Moreover, by Order XLV of the Prize Court Rules, 1914, it is laid down that in all cases not provided for by those rules the practice of the late High Court of Admiralty of England in prize proceedings should be followed, or such other practice as the President may direct. The rules do not provide for the case now arising. I therefore assume that as President of this Court I can give directions as to the practice in such cases as that with which the Court is now dealing.

The practice should conform to sound ideas of what is fair and just. A merchant who is a citizen of an enemy country would not unnaturally expect that when the State to which he belongs, and other States with which it may unhappily be at war, have bound themselves by formal and solemn Conventions dealing with a state of war like those formulated at The Hague in 1907, he should have the benefit of the provisions of such international compacts. He might equally naturally expect that he would be heard in cases where his property or interests were affected as to the effect and results of such compacts upon his individual position. It is to be remembered also that in the international commerce of our day the ramifications of the shipping business are manifold; and others concerned, like underwriters or insurers, would feel a greater sense of fairness and security if through an owner (though he be an enemy), the case for a seized or captured vessel were permitted to be independently placed before the Court.

From the considerations to which I have adverted, I deem it fitting, pursuant to powers which I think the Court possesses, to direct that the practice of the Court shall be that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of The Hague Conventions of 1907, he shall be entitled to appear as a claimant, and to argue his claim before this Court. The grounds of his claim would be stated in the affidavit to lead to appearance which is required to be filed by Or. III, r. 5, of the Prize Court Rules, 1914.

It was argued for the owner in the present case that the vessel was seized in port, and therefore ought only to be detained during the war. For the Crown, on the other hand, it was contended that the vessel was captured at sea, and ought to be condemned. It was urged that the vessel was seized within the port of Leith, and, alternatively, that she was taken within territorial waters, and not "on the high seas,' and therefore is not confiscable. (See Art. 3 of the Sixth Hague Convention, to which Germany did not agree, and under which her citizezns cannot benefit.) In this Convention

I am of opinion that the word "port" must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming to load or unload, embark or disembark. It does not mean the fiscal port. The vessel was not seized in any such "port." She was not in a port from which, if days of grace had been arranged, she could be said to "depart" (*sortir*).

The Sixth Hague Convention does not refer to "territorial waters." A vessel might be in territorial waters for scores of miles, either innocently or nefariously, and pass numerous ports without any intention to enter any of them. It is idle to say that on this account she would be free from capture. Where The Hague Conventions intend to deal with territorial waters they are expressly mentioned as distinguished from port; *e.g.*, in Convention XII, Arts. 3 and 4. Then it was contended that the vessel could not be condemned because she was not captured on "the high seas." The words "encountered on the high seas," in Art. 3, are not an accurate rendering of the authoritative French "*rencontrés en mer.*" Where the Conventions intend to describe "upon the high seas," the appropriate pharse "*en pleine mer*" is used. (See Convention VII, recital.) Another phrase, "*en haute mer*," is used in the Declaration of London, Article 37, to signify the same thing.

In my view the claimant in his affidavit was accurate when he said that his vessel was "taken at sea." The words of Article 3, "*rencontrés en mer*," are exactly applicable to this case. And I have no hesitation in finding that she was captured at sea, and not seized in port. I therefore decree that the vessel be condemned as lawful prize.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CHAPMAN and WALMSLEY, JJ. APPEAL FROM APPELLATE DECREE NO. 2652 OF 19[illegible]. MOHAMMED MONIRUDDIN AND OTHERS, Plaintiffs, Appellants *v.* KALU MUCHI, and on his death his major sons RAM RATAN MUCHI AND OTHERS, Defendants, Respondents. 17th March 1915.

Tenancy—Admissibility in evidence—Unregistered patta.

The appeal arose out of a suit for recovery of possession of certain land. The Plaintiffs relied upon a registered *kabuliyat*. The Defendants relied upon an unregistered *patta*. It was of the nature of a boundary dispute, that is to say, the Plaintiffs were admittedly in possession of the remainder of the land leased to them by the registered *kabuliyat*, and the Defendants were admittedly in possession of the remainder of the land leased to them by their unregistered *patta*. The lower Court admitted the unregistered *patta* as evidence of possession relying on t case of *Lalla Gopee Chand v. Shaikh Liaku Hussain* (25 W. R. 211).

Held, that the unregistered document, upon which the Defendants relied, was evidence at least of an assertion of a tenancy in the land.

The land was found to have been held by the Defendants for more than forty years. Hence the Defendants acquired a right of tenancy before the Plaintiffs' settlement.

Babu Tarak Chandra Chakrabarty for the Appellants.

No one appeared for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and RICHARDSON, JJ. APPEAL FROM ORDER NO. 118 OF 1913. RAJ KUMAR SARKEL, Defendant, Appellant *v.* RAJ KUMAR MALI AND OTHERS, Plaintiffs, Respondents. Heard, 22nd and 24th February. Judgment, 2nd March, 1915.

Fraudulent decree, sale in execution of, void or voidable.

The case for the Plaintiffs was that on the 8th June 1907, the Defendant by fraudulent suppression of processes, obtained an *ex parte* decree against them, for possession of the second property now in dispute, that the decree-holder not only executed the decree in respect of that property but also for realisation of the costs allowed to him and that he thus managed to purchase the first property at the sale which followed without the issue of the usual notices and proclamation. The present suit was instituted on the 13th May 1911 to set aside the alleged fraudulent decree, and to recover possession of both the properties. The Courts below found that it was not open to the Plaintiffs to have the alleged fraudulent decree vacated inasmuch as the time prescribed by Art. 95 of the First Schedule of the Indian Limitation Act for the purpose had elapsed before the institution of the suit. The Courts

below found that the fraud, if any, was brought to the knowledge of the Plaintiffs more than three years antecedent to the suit.

Held, that the Plaintiffs could not obtain a declaration that the decree was obtained by fraud and they were consequently not entitled to recover the property covered by the decree. That as it was not competent to the Plaintiffs to invite the Court to vacate the decree on the ground of fraud, it was not open to them to have the sale also set aside on the ground of fraud in the decree.

A sale in execution of a fraudulent decree is not a void but a voidable sale: till vacated by an appropriate proceeding, the rights created thereby are effective.

Babus Mahendra Nath Roy and *Chandra Kant Ghosh* for the Appellant.

Babu Girija Prasanna Roy Chaudhury for the Respondents.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before N. R. CHATTERJEA and GREAVES, JJ. APPEAL FROM ORDER No. 441 OF 1913. SRIMATI RUPJAN BIBI, Petitioner, Appellant *v.* KUMAR SATYA SANKAR GHOSAL and on his death his legal representative ANUKUL CHANDRA ROY, Manager, Court of Wards, Opposite Party, Respondent. Heard, 3rd February. Judgment 26th February 1915.

Execution of decree—Money-decree obtained by co-sharer landlord—Non-transferable occupancy holding, if can be sold.

The appeal arose out of an application for execution of a decree. The decree-holder in execution of a decree for money attached a holding which was not transferable without the consent of the landlord. The co-sharer landlords to the extent of an eight annas share filed a petition consenting to the sale of the holding. The Court below upon the authority of the cases of *Sakaruddin Choudhury* v. *Rani Hemangini Dasi* (16 C. W. N. 420) and *Dwarka Nath Pal* v. *Tarini Sankar Roy* (I. L. R. 34 Cal. 199) allowed the application. The judgment-debtor appealed to the High Court.

Held, that a non-transferable occupancy holding could not be sold in execution of a money-decree obtained by a co-sharer landlord.

Appeal from Order No. 77 of 1914, followed.

Moulvi Nuruddin Ahmed and *Babu Kumar Sankar Roy* for the Appellant.

Babu Ram Charan Mitra for the Respondent.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and COXE, JJ. APPEAL FROM APPELLATE DECREE No. 3083 OF 1911. SHEIK SAFAR ALI AND OTHERS, Defendants 1st Party, Appellants *v.* MOHESH LAL CHOWDHURY AND OTHERS (Plaintiffs), and GORA SAHU AND OTHERS (Defendants, 2nd Party), Respondents. Heard, 6th and 8th March. Judgment, 8th March 1915.

Sale, deed of—Registered deed not produced—No foundation laid for secondary evidence—Transfer of Property Act (IV of 1882), sec. 54—Evidence Act (I of 1872), sec. 91.

The disputed land originally belonged to one Budo Mandal. He died leaving three sons, Kalu, Talewar and Akul. They succeeded in equal shares in the property and the shares of Talewar and Akul had come to the Plaintiffs, although within these shares, there was one share, namely, ⅛th, which the Defendants held as under-tenants. The share of Kalu had come to the Defendants.

It was proved that the share of Talewar came ultimately to Giridhari Lal who sold it to the Plaintiff by a registered deed. That deed was not however produced and no foundation was laid for the admission of any secondary evidence with respect to it. The Courts below held that this defect was cured by the fact that Giridhari Lal supported the Plaintiff.

Held, that the principle laid down in the case of *Lal Achal Ram* v. *Raja Kazim Husain Khan* (9 C. W. N. 477), *viz.*, that when a transaction which is voidable is admitted by the person who is entitled to avoid it, it cannot be questioned by a third party, could not be invoked practically to repeal sec. 54 of the Transfer of Property Act and sec. 91 of the Evidence Act.

Babu Jogendra Nath Mookerjee for the Appellants.

Babu Jyotis Chandra Hazra for the Respondents.

A. T. M. *Appeal allowed in part.*

all three charges. Leaving out of consideration for the moment the fact that charges are not drawn up in summons cases, the obvious answer is that he would not be acquitted of all three offences, but only of the offence in respect of which the Complainant was absent.

I think the Rules should be discharged and the Petitioner in revision case No. 1833 remanded to jail to serve out the remainder of his sentence.

Rules discharged.

[PRIVY COUNCIL.]

[APPEAL FROM BENGAL.]

LORD SHAW.
LORD PARKER OF WADDINGTON.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.
1914,
5, November

MUNNA LAL PARRUCK and ors., Appellants,
v.
SARAT CHUNDER MUKERJI and another, Respondents.

Indian Limitation Act (IX of 1908), Sch I, Art. 183—Original Side, preliminary mortgage-decree made on—Application for order absolute for sale—Limitation—Transfer of Property Act (IV of 1882), sec. 89

A decree under sec. 89 of the Transfer of Property Act having been made on the Original Side of the Calcutta High Court on 16th December 1886, the mortgagee applied for an order absolute for sale on the 3rd June 1909. The High Court on appeal held, affirming the decision of the Trial Judge, that the application was barred by Art. 183 of the Limitation Act, being an application to enforce a judgment within the meaning of that Article.

Held, *by the Judicial Committee, that they saw no reason to interfere with the decisions of the lower Courts.*

This is an appeal from the following judgment of Sir Lawrence Hugh Jenkins, C. J. (Woodroffe, J., concurring), dated the 20th July 1911 :—

"The Appellant is a mortgagee, and the mortgage under which he claims is dated the 25th of January 1886. On the 16th of December 1886, he obtained a decree on his mortgage by consent. On the 3rd of July 1909 he made the application out of which the present appeal arises; and, by that application, he asks that he may be at liberty to add Upendra Lal Bose as a party Defendant to the suit and that thereafter he may be at liberty to proceed to sell pursuant to the decree made in this suit on the 16th of December 1886 an undivided quarter share of the Defendant Sarat Chunder Mukerji of and in premises No. 30, formerly No. 19, Clive Street, Calcutta, and Nos. 2 and 3, Bishoo Babu's Lane, Kidderpore, and the family dwelling house at Kidderpore, and that for the purpose of such sale all necessary directions may be given to the Registrar. Mr. U. L. Bose's position is that on the 8th of April 1903 he became a purchaser of the Clive Street property, and in his affidavit he states that 'he is a *bonâ fide* purchaser for full market value, that he had no notice of the Plaintiff's claim, that he had laid out large sums of money with borrowed funds in the improvement of the property, and that other persons besides himself have got an interest therein, and that it would be extremely hard if after the lapse of 23 years the Plaintiff is allowed to assert a claim which he had given up years ago'.

"The case was heard by Mr. Justice Fletcher, the parties before him being the applicant, the mortgagee, on the one side, and on the other the mortgagor and Mr. U. L. Bose who resisted the application with success. From the judgment of Mr. Justice Fletcher the present appeal has been preferred: and, I will, at the outset, deal with a point taken on behalf of Mr.

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U. L. Bose. His name does not appear as a Respondent, and therefore it is maintained, as against him, the judgment of Mr. Justice Fletcher cannot be touched. But it appears that the Appellant, according to his lights, made every effort he could, to make Mr. U. L. Bose a party Respondent. He may not have proceeded in the most approved manner, still undoubtedly he was anxious to have Mr. U. L. Bose as a Respondent, and naturally anxious. Having failed in his endeavour, because, he says, he could not persuade the Court officers to grant the necessary process, he has applied under r. 21, Or. XLI, that Mr. U. L. Bose may be added as a Respondent here. It has been suggested that the Court has not power to do that, inasmuch as the time for appealing has elapsed. Counsel has even been able to cite a case which he thought bore out that view, but I think the case has been misunderstood and it merely amounts to this that it is a question for the Court in its discretion to determine in each case whether or not it will make an order contemplated by r. 20, Or. XLI. I have indicated the circumstances under which it became necessary to make the application in this case, and I think that the Appellant certainly is entitled to ask that Mr. U. L. Bose should be made a party, and that therefore the order to that effect should go. Therefore, I propose to deal with this appeal on the footing of Mr. U. L. Bose being a Respondent before us.

"It will be seen that the two critical facts are—first, that the decree on the mortgage was made so far back as the 16th of December 1886 and that the present application is made in 1909. Those dates have naturally prompted the Respondents to raise a plea of limitation and to suggest that there must be some mode of limiting litigation. The question that we have to decide is whether the applicant is right when he contends that he is, so far as this application goes, free from the law of limitation.

"Now, the decree first provides for a personal decree against the mortgagor and this is followed by a provision for the return of documents and so forth, on payment in accordance with this personal decree. Then there is a provision that in default of payment there is to be a sale of the property, and it is further ordered that if the money realised by such sale shall not be sufficient for the payment in full of the sum of Rs. 25,382-8-0 with interest, that being the amount for which the personal decree was passed, then the Defendant should pay to the Plaintiff the amount of the deficiency together with the Plaintiff's costs. The decree is in a sense peculiar, and that has led to a contention before us on the part of the Respondents that it does not come within the provisions of the Transfer of Property Act in general or of secs. 88 and 89 in particular. No doubt, if those sections be read literally, that is so. On the other side it is contended that the decree comes within the provisions of the Transfer of Property Act, and it is on that ground principally that it is contended in the light of the cases that the present application is not barred.

"For the purpose of my judgment I will assume that this decree is within the Transfer of Property Act, and I prefer to put it on that broad ground rather than to seek minute distinctions, though I can quite see that the decree does encourage the distinctions which have been suggested.

"Now, if it be a decree, as the Appellant before us contends, under sec. 89 of the Transfer of Property Act, and was a decree in 1886 when it was passed, then it is clear that no further decree was to follow on it. All that was to follow on it was, under sec.

89, an order for sale. It is no use our looking into expressions in the cases, for the purpose of determining this; the Act itself is clear and plain. It provides in sec. 88 that there shall be a decree for sale. Sec. 89 provides that 'if such payment', that is, the payment contemplated by the decree, 'is not made, the Plaintiff or the Defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in sec. 88; and thereupon the Defendant's right to redeem and the security shall both be extinguished'. Now, what is, speaking generally, the nature of that order for sale? In *Harendra Lal Roy Chowdhury* v. *Maharani Dasi* (1) there was a decree for sale, substantially as there was here, and the Respondents in that case, the mortgagors, being in default, the Appellants petitioned for an absolute order for sale. Lord Davey in disposing of the case says in the course of his judgment, 'under the circumstances it is not surprising that the Respondents were not able to find the money on the stipulated day; and thereupon the present Appellant presented *a petition for realization of his entire decree by sale of the mortgaged properties.*' He goes on to say, in describing what had been done by the learned Subordinate Judge who acceded to the application—'The learned Subordinate Judge in the first instance *gave the Appellant execution for the whole amount of his decree*'; so that, at any rate, it appeared to the Privy Council and to Lord Davey in that case that an application for an order for sale was a petition for realization by the mortgagee of his decree.

"Now this case falls within the provisions either of Art. 183 or Art. 181 of the Limitation Act—it does not fall within the provisions of Art. 182. Art. 183 deals with an application 'to enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction or an order of His Majesty in Council', and provides 'a period of twelve years from when a present right to enforce the judgment, decree or order accrues to some person capable of realising the right.' If this case comes within Art. 183, it is free from the embarrassment of the conflicting decisions which have arisen under Art. 182. If and so far as this can be regarded, in the words of Lord Davey, as 'an application for realization of a decree', it is not unfair to say that it is an application *to enforce a judgment.* The word 'enforce' has a fairly obvious meaning—we have been referred to one or two dictionaries as to what its meaning is: but I take it to be clear even apart from the dictionaries that the word 'enforce' is not limited to realization by execution but may have a wider meaning. So even if it can be said that the present proceeding is not strictly in execution, but is a form of judicial relief under a decree, it still would legitimately come within the expression 'to enforce a decree,' and it seems to be manifest that it is either a proceeding in execution or a proceeding for judicial relief under a decree: and, I see no reason why Art. 183 should not apply. If that be so, then it follows that this application is out of time.

"I do not propose to make more than a passing reference to the argument that has been addressed to us in relation to Art. 181

"There have been brought to our notice numerous cases on Art. 181 and Art. 182.

(1) L. R. 28 I. A. 89: s. c. 5 C. W. N. 586 (1901).

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Arts. 178 and 179 of the former Limitation Act which they reproduce, with a view to showing that these Articles did not apply in the past to an application under sec. 89 of the Transfer of Property Act and that by parity of reasoning they could not govern applications under the substituted provisions of Or. XXXIV of the Code of Civil Procedure. In this connection it has been a matter of argument and of considerable contest before us as to whether this case is to be decided by reference to the old Code and the old Limitation Act, or by reference to the new Code and the new Limitation Act, both of which came into operation on the 1st of January 1909. If the view I have expressed as to the application of Art. 183 be right, no question of this kind arises, inasmuch as the Plaintiff in 1886 obtained a decree which required no supplemental decree, but required only an order. Had the decree been an incomplete one and required a further decree, then having regard to the way in which Acts in reference to procedure are to be construed, possibly the provisions of the present Code would have been applicable. But be that as it may, I fail to follow the line of reasoning which would suggest that Art. 181 would still not have presented a bar to the application for this further decree. One object in view when the present Code was passed was to end, as far as possible, the conflict of decisions which embarrassed the Courts, and among those conflicting decisions were those which dealt with two points:—*first* of all whether an application for an order under sec. 89 of the Transfer of Property Act was an application in execution or not: and, *secondly*, whether, if it was not an application in execution, Art. 181 constituted a bar on the ground that the application was one not contemplated by the Code of Civil Procedure. Those were not the only points that were sought to be set at rest, but those were prominent among them—and, the Act indicates that the scheme whereby these two sets of conflicts were to be composed was, in the first instance, by making it clear that an application, which was to follow on a preliminary decree for sale, was not to be an application in execution, inasmuch as the next step under Or. XXXIV, r. 5, is not for an *order* for sale but for a *decree* for sale. And, the mode in which the other conflict was composed was by taking the provisions as to mortgage suits out of the Transfer of Property Act and bringing them within the Civil Procedure Code, so that it would no longer be possible to contend that Art. 181 applied on the ground that these applications are not under the provisions of the Civil Procedure Code. I am aware that there is an opinion expressed in *Madhab Mani Dasi v. Pamela Lambert* (2) which it may be difficult to reconcile with this, but it is not a decision, for, as I read the judgment in that case, the learned Judges expressly refrained from deciding the point which was a necessary preliminary to its becoming a point calling for actual decision. It could only be a point for decision if and when it was decided that the new Code applied. But so far from there being any such decision, the learned Judges not only expressly refrained from deciding this, but the decision actually passed by them in effect negatived the view that the case fell under the new Code, for, in conformity with the terms of the application out of which the appeal arose they decided that there should be an *order* absolute and not a final *decree* for foreclosure. I have referred to this matter, as I desire for future consideration when the point actually arises for decision whether or not Art. 181 presents a bar to an application for a final decree, whether

(2) 15 C. W. N. 337 (1910).

it be under r. 5 or r. 3 of Or. XXXIV when that application is made beyond the time contemplated in Art. 181, for as yet there has been no actual decision on this point in the view I take of the case of *Madhab Moni Dasi* v. *Pamela Lambert* (2).

"The result is that for the reason which I have indicated in the earlier part of my judgment, I think Mr. Justice Fletcher rightly decided that the present application was barred, and that therefore this appeal should be dismissed with costs: Mr. C. L. Bose is entitled to a separate set of costs."

Hence this appeal.

Mr. C. E. E. Jenkins, K. C. (with him *Sir William Garth*), for the Appellants submitted that the application for an order absolute for sale of the mortgaged property was not one to which any of the Articles of the Indian Limitation Acts applied, and that it was not therefore barred by limitation. There was a conflict of authority on the point in India, but he submitted that the view of the Calcutta High Court was right.

Mr. L. DeGruyther, K. C. (with him *Mr. A. R. Macklin*), who appeared for the Respondents, interposed and submitted that the point was concluded by their Lordships' decision in *Abdul Majid* v. *Jawahir Lal* (3) and *Batuk Nath* v. *Munni Dei* (4).

Mr. Jenkins thereupon conceded that he could not distinguish the present case from the decisions referred to.

Their Lordships' Judgment was delivered by

Lord Shaw.—Their Lordships see no reason for interfering with the decisions of the Courts below, and they will humbly advise His Majesty to dismiss the Appeal with costs.

(2) 15 C. W. N. 337 (1910).
(3) 18 C. W. N. 963 (967) (1914).
(4) L. R. 41 I. A. 104 : s. c. 18 C. W. N. 740 (1914).

Solicitor: *Mr. G. C. Farr* for the Appellants.

Solicitors: *Messrs. J. E. Fox & Co.* for the Respondents.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

Appeal from Original Decree No. 409 of 1910.

Mookerjee, J.
Walmsley, J.
1914,
Heard, 21, 22, 23, 24 & 27, July.
Judgment, 31, July.

Amrita Sundari Debi and ors., Defendants, Appellants,
v.
Serajuddin Ahmed and ors., Plaintiffs and Defendants, Respondents.

"Chur" land—"Thak" and Survey maps—Consent decree in previous suit—Decree not inter partes *—Constructive possession of owner of submerged lands during diluvion—Adverse possession—Limitation*

The Plaintiffs sued for declaration of their title to certain Chur lands which they alleged were partly reformations on the site of and partly accretions to three Mauzas. The Churs were measured in the course of Thak proceedings in the year 1859 and were subsequently measured by way of survey during the following year. The Plaintiffs based their title to the disputed land on the Thak map of 1859, the Survey map of 1860 and a consent decree passed in 1879 in a suit instituted by the predecessors-in-interest of the Plaintiffs against persons represented by the Defendants in consequence of a dispute about the possession of some of the lands of these Churs.

Held, *on the evidence, that the proceed-binding on the parties as a decree after a contentious trial, but it cannot have greater validity than the compromise itself.*

Held, *on the evidence, that the proceedings in the suit of 1879 were not* bonâ fide: *that the compromise was entered into without authority from the Defendants,*

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and that it was not established that the Defendants, even though apprised of the compromise, had acquiesced in it.

That the rights of property as between two parties cannot be affected by a map drawn for a different purpose—a purpose not relevant to the subject of the dispute between them.

That the location of the boundary in the map prepared in the suit of 1879 could not be treated as conclusive between the parties for the purposes of the present controversy, inasmuch as it was not necessary for the disposal of that suit and was outside its scope.

KERR *v.* NUZZUR MAHAMED (16), KANTO PRASHAD *v.* JAGAT CHANDRA (18), RANAJIT SINHA *v.* BASANTA KUMAR (19), PREO NATH *v.* DURGA TARINI (20) *and* SHIB CHURN *v.* NIL KANTHA (21), *relied on.*

No hard and fast rule can be laid down that a Survey map is more reliable than a Thak map. The true principle is that the map which more clearly agrees with the local land-marks is the one that should be followed.

That as the Thak map was made in the presence of the parties or their agents, it was primâ facie *binding on them and in the circumstances of the present case the decree should be based not on the Survey map but on the Thak map after it has been relaid with as much accuracy as practicable.*

That as the rightful owners must be deemed in law to have been in possession of the submerged lands during the period of diluvion, for the purpose of deciding the question of limitation, the only point for investigation was the period of time when the lands re-appeared and became fit for occupation; and as the possession of the Defendants after reformation of the disputed lands did not extend over the statutory period, the claim of the Plaintiffs was not barred by limitation in respect of lands which lay within the Thak boundaries of their Churs.

That as regards the Plaintiffs' claim by adverse possession to land lying beyond the Thak boundaries of their Churs, the Plaintiffs were bound to establish in respect of specific parcels of land that they have been in occupation thereof to the exclusion of the rightful owner continuously for a period of twelve years, for the theory of constructive possession is applied only in favour of a rightful owner and is not extended in favour of a wrong-doer whose possession is treated as confined to land of which he is actually in possession.

This was an appeal from a decision of Babu Behari Lal Chatterjee, Subordinate Judge, Faridpur, dated 25th April 1910.

The material facts will appear from the judgment.

Dr. Rash Behary Ghose, Babus Dwarka Nath Chakrabarty, Biraj Mohon Majumdar, Satis Chandra Bhattacherjee and *Jatindra Narain Choudhury* for the Defendants-Appellants.

Mr. S. P. Sinha, Babus Tarakishore Choudhuri, Troylokyanath Ghose and *Surendra Nath Das Gupta* for the Plaintiffs-Respondents.

Babu Joges Chandra Roy for the Defendant-Respondent.

The JUDGMENT OF THE COURT was as follows:—

The subject-matter of the litigation, which has resulted in this appeal, consists of a large tract of land, included in a Chur formed in the bed of the river Ganges, called also Kirti-Nasha, in the District of

(16) 2 W. R. P. C. 28 (1864).
(18) I. L. R. 23 Cal. 335 (1895).
(19) 9 C. L. J. 597 (1908).
(20) 14 C. L. J. 578 (1911).
(21) 17 C. L. J. 642 (19.2).

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Faridpur. The land is described in the plaint as comprised within three sets of boundaries which constitute three distinct parcels, *Ka*, *Kha*, *Ga*. The areas of the parcels were stated approximately in the plaint as 10 kanis (=90 bighas), 3 drones (=432 bighas) and 15½ drones (=2,232 bighas) respectively. On measurement, however, the aggregate area of the first two parcels has turned out to be 347 bighas, and the area of the third plot 4,221 bighas, The case for the Plaintiffs is that the disputed lands are included in estate No. 5603 of the Faridpur Collectorate, held in putni by them under the proprietors. They allege that the lands are partly reformations on the site of and partly accretions to three Mauzas, Bhaga Chur, Chur Dotali and Chur Lasti also called Chur Bhaga. The Churs were measured in the course of Thak proceedings in the year 1859 and were subsequently measured by way of survey during the following year. The Plaintiffs further assert that in 1879, as a consequence of a dispute about the possession of some of the lands of these Churs a suit was instituted by their predecessors-in-interest against persons now represented by the Defendants. In the course of this litigation, it is said, the lands were measured, and a decree made by consent of parties. The Plaintiffs found their title to the disputed lands on the Thak map of 1859, the Survey map of 1860, and the consent decree in the suit of 1879. The immediate occasion for the institution of this suit is stated to be a dispute as to the possession of the lands, which culminated in a proceeding under sec. 145 of the Criminal Procedure Code. The dispute related to plots *Ka* and *Kha* and an intervening strip of land. The Magistrate held, on the 8th March 1905, with regard to plots *Ka* and *Kha* that neither of the disputants was in possession, and accordingly made an order for attachment under sec. 146 of the Criminal Procedure Code. As regards plot *Ga*, the Plaintiffs allege that the Defendants wrongfully took possession of it on its re-appearance in 1899 after diluvion. The Plaintiffs, on these allegations, pray for declaration of their title to the disputed lands by way of reformation on the original site of and contiguous accretion to the three Mauzas, Bhaga Chur, Chur Dotali and Chur Lasti, as comprised within the Thak and Survey boundary lines, and within the lines of the decree in the suit of 1879; the Plaintiffs also claim title by adverse possession for the statutory period. They seek to recover possession by ejectment of the Defendants as trespassers and claim mesne profits as also the sum in the custody of the Collector as the surplus profits of the land attached by the Magistrate. The Defendants resist the claim on the ground that the Plaintiffs have no title in the disputed lands, and that, if they had any title, it has been extinguished by operation of the law of limitation. The Defendants may be grouped into two classes: one set claims part of the lands as included in Mauza Nemua, also called Sakhipura, which appertains to estates Nos. 9961—67; the other set claims a portion of the lands as included within Mauza Tarabunia comprised within estate No. 9670. The proprietors of Sakhipura also repudiate the consent decree in the litigation of 1879 as not conclusive upon the questions now in controversy. The Subordinate Judge has, upon an examination of the voluminous evidence on record, both oral and documentary, decreed the claim in part. He has found in substance that the Thak line has not been correctly delineated by the Amin and cannot consequently be made the foundation for a decree, he has also found that the Survey line has been correctly delineated

by the Amin and was inaccurately relaid on the map prepared in the suit of 1879; but he has held that the parties are bound by the delineation of the boundary on that map to the extent it goes. The Subordinate Judge has accordingly taken as the boundary of the Mauzas claimed by the Plaintiffs, a composite line consisting partly of the Survey boundary, partly of the boundary line on the map in the suit of 1879, and, as these two lines are not conterminous, partly also of an imaginary line drawn from east to west to connect their ends. In this view, the Subordinate Judge has dismissed the claim for plot *Ka*, has decreed to the Plaintiffs 213 bighas 15 cottahs out of plot *Kha* and 1,905 bighas 12½ cottahs out of plot *Ga*; it may be added that the suit has failed in respect of all lands claimed by the proprietors of Tarabunia as included within their estate. The Defendants, proprietors of Sakhipura and claimants under them, have appealed to this Court. On their behalf, the decree of the Subordinate Judge has been attacked on the ground that the Plaintiffs are entitled at best to all lands included within the lines of the Thak survey of Bhaga Chur, Chur Dotali and Chur Lasti or Chur Bhaga. It has further been argued that the claim is barred by limitation in respect of all lands situated beyond the Thak boundaries of these villages, even if the Plaintiffs are able to establish a title thereto. The Plaintiffs-Respondents, the proprietors of Bhaga Chur, have preferred a cross-appeal which is directed both against the Appellants, the proprietors of Sakhipura, and the Respondents, the proprietors of Tarabunia. The objection in support of the cross-appeal against these two sets of persons are based on distinct grounds; against the proprietors of Sakhipura, it has been urged that the Plaintiffs are entitled to more lands than what have been decreed to them as included within Bhaga Chur; as against the proprietors of Tarabunia it has been argued that the Plaintiffs have acquired a good title by adverse possession. On these arguments, two questions emerge for consideration, *viz.*, those of title and possession. As regards the question of title, the points which require examination may be formulated as follows:—*viz.*, *first* does the map prepared in the litigation of 1879 conclude the controversy in this view, either entirely or partially; *secondly*, if this question be answered in the negative, should a decree be made on the basis of the Thak map as delineated on the case map in the present suit; and, *thirdly*, if the point last mentioned be not answered in the affirmative, should a decree be made on the basis of the lines of the Survey map as reproduced on the case map? It is plain that the substantial question in controversy relates to the scope of the suit of 1879, and the effect of the decision therein upon the points now in dispute, and we shall first examine the elaborate arguments which have been addressed to us on this part of the case; but for the correct appreciation of the points raised, it is essential to give a brief outline of the antecedent dispute between the parties regarding the subject-matter of this litigation.

In 1859, the officers in charge of the Thak proceedings measured the lands comprised in Chur Bhaga, Chur Dotali, Chur Lasti, Chur Sakhipura and Chur Tarabunia. In the following year, the lands were re-measured and fresh maps prepared by the Survey authorities. The parties were then in controversy as to a large tract, 16 drones or 2,300 bighas in area, which was shown by the Thak authorities as situated within Sakhipura. Two suits were thereupon instituted in respect of this land, one on the 1st August 1863 by a lessee under the proprietors of Chur Bhaga, the other